

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF FOR APPELLANT
AND JOINT APPENDIX**

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 8868

263

**EHRET MAGNESIA MANUFACTURING COMPANY,
INC., *Appellant,***

v.

**E. D. GOTHWAITE, Trading as National Heating
Company, *Appellee.***

**Appeal from the Judgment of the District Court of the
United States for the District of Columbia.**

**UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA**

DEC 11 1944

Joseph W. Stewart

CLERK

**JOHN DILLON FITZGERALD,
226 Woodward Bldg.,**

**DONALD M. SULLIVAN,
226 Woodward Bldg.,
Washington, D. C.,
*Attorneys for Appellant.***

INDEX TO BRIEF.

	Page
Jurisdictional Statement	1
Statement of Case	2
Statement of Points	6
Summary of Argument	9
Argument	10
Conclusion	15

CITATIONS.

Carleton v. Jenks, 80 Fed. 937, 26 C. C. A. 265 (1897) ..	13
Savery Hotel Co. v. Under-Feed Stoker Co. of America, 178 Fed. 806 (C. C. A. 8th Cir. 1910)	14
Standard Oil Co. v. Lloyd, 159 So. 371, 373	15
U. S., for use and benefit of Brown-Wales Co. v. Leff, 26 F. Supp. 930 (D. C. D. Mass., 1941)	14

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 8868.

EHRET MAGNESIA MANUFACTURING COMPANY,
INC., *Appellant*,

v.

E. D. GOTHWAITE, TRADING AS NATIONAL HEAT-
ING COMPANY, *Appellee*.

Appeal from Judgment of the District Court of the United
States for the District of Columbia.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from the District Court of the United States for the District of Columbia to review its final judgment of May 29, 1944, for plaintiff (appellee) in an action for damages for breach of contract. The case was tried by the Court without a jury.

Plaintiff's complaint for damages for breach of contract and his More Definite Statement or Bill of Particulars (Jt. App. 2-9), and defendant's Answer and Counterclaim and Bill of Particulars (Jt. App. 9-14), as well as plaintiff's Reply to defendant's Counterclaim (Jt. App. 15-17), and evidence adduced (Jt. App. 25-127), at the trial, resulted in the Court below entering Findings of Fact and Conclusions of Law and a Judgment in favor of plaintiff (appellee) (Jt. App. 17-25).

The District Court had jurisdiction under the provisions of Title 11, Section 306, Code D. C. (1940).

This Court has jurisdiction to review said final judgment under the provisions of Title 17, Section 101, Code D. C. (1940).

STATEMENT OF CASE.

Plaintiff (Appellee) is a contractor engaged in the business of constructing and installing high pressure steam distribution systems, hot water heating systems, and the like, and he trades under the name of "National Heating Company". On December 15, 1941, appellee entered into a certain written contract with the United States of America, for the furnishing of certain materials and performance of certain labor in connection with said contract with the Government at Langley Field, Virginia, involving the construction of a high pressure steam distribution system, hot water heating system, and additions and alterations to boiler rooms, all in accordance with his said contract with the Government, and of the plans and specifications in connection therewith. By said contract, appellee was required to and did guarantee the materials and installation of the high pressure steam distribution system to be free of maintenance for one year after completion. (Jt. App. 2-3). The specifications referred to in said contract required that all of the articles, supplies, etc., to be furnished by the plaintiff (appellee) should be of standard manufacture or for which detailed design requirements were not prescribed in the said specifications, should be

guaranteed by the plaintiff (appellee) against any failure in proper use of operation, caused by defective material, workmanship, or design, for a period of at least one year from the date of final acceptance of the complete work, and, should any part of the system fail within one year from completion, the plaintiff (appellee), without cost to the United States, would promptly and satisfactorily remedy the same (Jt. App. 5).

The appellant (defendant) is the manufacturer of the Pre-Sealed Insulated Pipe, known as the "Durant System", which Durant System the appellee (plaintiff) purchased from the appellant. Appellant's proposal of November 3, 1941, (Jt. App. 122-125) and appellee's order of December 15, 1941 (Jt. App. 125), and appellant's acknowledgment of said order of appellee on December 23, 1941 (Jt. App. 126-127), constituted the contract between appellant and appellee.

By appellant's said proposal of November 3, 1941, it was to furnish its "Durant Insulated Pipe" required outside underground, for the high pressure steam heating system, both supply and return, in accordance with the plans and specifications and addendum No. 5, issued October 13, 1941, (Jt. App. 122-123). The insulated pipe was to be shipped by the appellant to Langley Field, Virginia, when and as directed, in accordance with the progress of the job. The contract price also included the furnishing by appellant of the "Durant" system for expansion loops, and for the expansion bends: All the pipe, welding ells, over-sized insulated pipe for the legs of the bends, furnishing and installing inner casing, insulation, asphalt and outer casing over the long radius tube turns after they had been welded into position (Jt. App. 123).

After the insulated pipe had been installed by the appellee and welded and tested by him, the appellant was to insulate the field joints, that is, where two lengths of pipe are joined together, said joints not to exceed 18 inches in length. Appellant was to install water-proofing in

foundation walls where the conduit enters buildings or manholes; and also, to insulate all fittings and expansion bends, when and where necessary according to design. However, the "Durant Insulated Pipe" furnished by appellant was not to be run further than the inside of manhole walls in manholes (Jt. App. 123-124). The work and cost which was to be born by the appellee was as follows: Distributing of insulated pipe from point of truck delivery at job site to trenches; install pipe in trenches; cost of welding ells and/or fittings which are insulated in the field, with the exception of those furnished for the expansion bends; lining up of pipe in trenches to grade requirements; cost of clamps, channels, and concrete for anchors; all welding and mechanical work; back filling; cost of installing sleeves in foundations where conduit system enters buildings (Jt. App. 124). Appellee by his letter of December 15, 1941, to the appellant, ordered from the appellant (defendant) the materials as outlined in its letter of November 3, 1941 (Jt. App. 125). Appellant by letter dated December 23, 1941, acknowledged appellee's said order of December 15, 1941, and referred to its original proposal of November 3, 1941. (The November 4, 1941, mentioned in appellant's said letter of December 23, 1941, being intended for November 3, 1941, (Jt. App. 126-127).

Appellee, in his complaint alleged that, "without fault of plaintiff (appellee)" appellant's materials and installation made by it pursuant to its contract with appellee broke down and failed in a substantial portion thereof, and that appellant failed in its guarantees and warranties to remedy the condition; that appellant was required under its contract with appellee to maintain the system for a period of at least one year from its completion (Jt. App. 3-4). The appellant in its answer denied that the obligation of maintenance for one year was an obligation of the appellant, but that such one year maintenance was the obligation of the appellee under his contract with the Government; that any failure that may have occurred in the

system, was due entirely to the fault of the appellee and in nowise through the fault of the appellant; and denied it failed in its guarantees and warranties (Jt. App. 9-12).

A counterclaim was filed by appellant alleging that there was due from appellee to appellant the sum of \$4,012.13 (Jt. App. 13-14). However, appellant was able only to establish by way of counterclaim the sum of \$3,776.95, which sum was allowed by the Court below by way of set-off, against the appellee's claim of \$5,038.00, the Court finally entering a Judgment against appellant in the sum of \$1,261.05 and costs (Jt. App. 24-25).

After completion of the work called for in the Government contract between appellee and the United States, and before the job had been accepted by the Government, it was found upon inspection by the Government engineers and inspectors that when the steam had been turned on, the heat in the manholes emanating therefrom had melted the asphalt waterproofing of the pre-sealed pipe where it terminated inside the manholes and some of said asphalt had not remained in place but had run into certain of the manholes. As a result, surface water entered into the pre-sealed pipe through pouring slots which were located at about two feet intervals along the top of the pipe line thereby wetting the magnesia insulation. This resulted in heat reaching more asphalt further along the line, thereby melting the same and causing it to flow, some into certain manholes and some out of various pouring slots.

The trouble originated at the inside wall of the manholes where the pre-sealed pipe ended, and resulted from a failure to properly seal off or bind the asphalt waterproofing material in such a manner as to prevent its flowing when it became heated, and as the insulation was exposed by the flowing away of the asphalt the trouble progressed due to the insulation becoming wet both from the water entering the manholes from the surface and the water entering the pre-sealed pipe through the pouring slots as the latter became opened when the asphalt flowed into the manholes (Jt. App. 31, 30-33).

The appellee claimed such failure, caused as herein stated, was due to appellant's breach of warranties. The appellant denied such breach and claimed the cause of the failure was due to appellee's failure to properly seal off the pre-sealed pipe where it appeared on the inside of the manholes, so that water entering the manholes would not attack the magnesia of the pre-sealed pipe where it entered the manholes; and also, to properly insulate the fittings and other pipes inside of the manholes so that the heat generated inside the manholes would not melt the asphalt around the pre-sealed pipe.

STATEMENT OF POINTS.

1. The Court erred in finding for the plaintiff.
2. The Court erred in not finding for the defendant.
3. The Findings of Fact and Conclusions of Law by the Court and the Judgment entered thereon are contrary to the evidence.
4. The Findings of Fact and Conclusions of Law by the Court and the Judgment entered thereon are contrary to the weight of the evidence.
5. The Court erred in finding that the melting and flowing of the asphalt waterproofing material in the pre-sealed pipe when subjected to heat constituted a latent defect which could not have been discovered by the plaintiff upon examination and without actual test in operation; and that this latent defect was or should have been known to the defendant.
6. The Court erred in finding it was the obligation of the defendant to properly seal off the insulation and waterproofing where the pre-sealed pipe terminated inside the manholes so that the asphalt would not run when heat was applied to the steam line, or, in the alternative, to have warned the plaintiff of said latent defect and advised plaintiff as to what was necessary to be done to prevent the asphalt from leaving the pipe.

7. The Court erred in finding as a result of the failure of the pre-sealed pipe as installed by the defendant and of the defendant's failure and refusal to make amends therefor, plaintiff suffered loss and damage on and incident to the Government Contract between the plaintiff and the U. S. Government, in the total sum of \$5,038.00.

8. The Court erred in holding that the plans and specifications having been incorporated in the subcontract by reference, the defendant was bound by the guarantees provided in section 3-02 (d) and in section 8-27 of the specifications as amended, including the provision that all articles, supplies, equipment, parts and assemblies thereof shall be guaranteed against any failure in proper use of operation caused by defective material, workmanship or design for a period of at least one year from the date of final acceptance of the complete work under the aforementioned Government contract. The failure of the materials and installation furnished by the defendant constituted a breach of the said subcontract on the part of the defendant for which the plaintiff is entitled to recover his damages.

9. The Court erred in holding that the defendant as a sub-contractor under a principal contract between the plaintiff and the United States of America impliedly assumed all of the obligations and liabilities of the principal contract in so far as it related to the materials and workmanship undertaken and performed by the defendant; and as such subcontractor the defendant impliedly undertook to furnish materials and make partial installation thereof subject to the condition that its materials and installation would be guaranteed against any failure in proper use of operation for a period of at least one year from the date of acceptance of the complete work under said Government contract. The failure of the materials and installation furnished by the defendant constitutes a breach on the part of the defendant of the guaran-

tees contained in the specifications, for which the plaintiff is entitled to recover his damages.

10. The Court erred in holding that the defendant, having full knowledge of the purposes for which its material and installation were to be used, and the plaintiff having relied on the skill and judgment of the defendant in the manufacture and partial installation thereof, and from the facts in this case necessarily having had to rely on the defendant's skill and judgment, there is an implied warranty that the defendant's material and installation would be free from latent defects and fit and satisfactory for the uses and purposes for which they were intended; and the failure of the defendant's materials and installation under actual tests of operation, such failure being due to a latent defect known to the defendant but which could not have been discovered by the plaintiff upon examination of the materials, constitutes a breach of implied warranty on the part of the defendant, for which the plaintiff is entitled to recover his damages.

11. The Court erred in not holding that the plaintiff, having completed the necessary manholes and the installation of the pipes and fittings therein and having insulated the pipes and fittings inside the manholes, all in accordance with the plans and specifications, after the defendant had sealed the joints in the field and left the job, and having failed to notify the defendant that he had completed construction of the manholes and to return to the job and waterproof the ends of the Durant system inside the manholes, assumed the responsibility for any failure in the system, thereby relieving the defendant from damages which might flow from the failure in the system.

SUMMARY OF ARGUMENT.

1-10. There was no latent defect in the pre-sealed pipe furnished the appellee under its contract with the appellant; that the appellee being a general contractor engaged in the business of installing high pressure steam distribution systems, knew, or with the exercise of reasonable care, should have known, that when water attacked the magnesia of the appellant's pre-sealed pipe the magnesia would absorb the water thereby causing deterioration of same; that the asphalt binding which the appellee knew was poured in hot liquid form into the field-joints by the appellant, would again melt and flow if heat generated inside the manholes sufficient to melt the same; that the appellee failed in its duty to properly see to it that the fittings and pipes constructed by him inside the manholes were securely insulated by him so as to minimize the heat inside the manholes; that appellee failed to properly seal off the pre-sealed pipe where it appeared inside the manholes. All of which was the duty of the appellee, and appellee's neglect in this connection caused the damage to the pre-sealed pipe; that the one year maintenance applied to the appellee and under the circumstances of this case did not carry over to appellant.

11. The appellee having completed the necessary manholes and the installation of the pipes and fittings therein, and having insulated the pipes and fittings inside the manholes, all in accordance with the plans and specifications, after the defendant had sealed the field joints and left the job, and having failed to notify the appellant that he (appellee) had completed construction of the manholes and to return to the job and waterproof the ends of the pre-sealed pipe inside the manholes, appellee assumed the responsibility for any failure in the system, thereby relieving the appellant from any damages which might flow from the failure in the system.

ARGUMENT.

The pre-sealed pipe, furnished by appellant and delivered by it to the job at Langley Field, was substantially similar to the physical exhibit #12, and was in as good condition as said exhibit (Appellee's testimony Jt. App. 60). The appellant by its contract with appellee sold and delivered to appellee the pre-sealed pipe, and when the same had been placed into trenches by appellee, and installed and tested by him, appellant was to insulate the field joints, that is, where two lengths of pipe are joined together, said joints not to exceed 18 inches in length; also, it was to install the water-proofing in foundation walls where the conduit enters buildings or manholes; insulate all fittings and expansion bends, when and where necessary according to design; and the Durant Insulated Pipe would not be run further by the appellant than the inside of manhole walls in manholes (Jt. App. 123-124). All other work and costs were to be absorbed by appellee (Jt. App. 124).

The manholes constructed by appellee were composed of concrete walls about six inches thick, and the whole material, the pipe, the insulation, the water-proofing and the sheet jacket ran through the concrete wall of each manhole. When it got to the inside wall of the manholes, certain fittings were to be installed by appellee, which was no part of the appellant's work. The interior of the manholes was the responsibility of appellee. The obligation of appellant ended on the inside wall of each manhole and each building. (Cross exam. of Appellee Jt. App. 69.) The appellant was not required to insulate on the interior of the manholes (Jt. App. 69-70; 92-95). Appellee undertook to cover all pipe in the manhole from the point where appellant's magnesium ended inside the manholes (Jt. App. 70-71). The appellee did not attempt to contain the asphalt beyond wrapping water-proof paper around the outside joint (Jt. App. 71; 95-97). The appellee put on what he thought was sufficient material to keep any water from getting out of the manhole into the pipe; and he claims the work he did in

the manholes was in accordance with the War Department's specifications (Jt. App. 71). The reason appellee put the paper covering over the pre-sealed pipe where it entered the manholes was to keep out moisture; and if water had gotten into the manhole by reason of rain or some other foreign substance, the water would rise and go above the pipe which was in the manhole (Jt. App. 74). At point 14, where the difficulty appeared worse than at any other point, water was running at the pre-sealed pipe union into the manhole in considerable quantity (Appellee's direct testimony Jt. App. 55).

Appellee's witness, C. J. Robin, a War Department Engineer in charge of all construction at Langley Field, at the time, under the supervision of the U. S. Engineer Office at Norfolk, Virginia, testified that he had personal knowledge of manhole #14, and that:

"The reason the contract was not accepted as complete was because the asphalt seal around the pre-sealed pipe had moved, flowing into drip pit No. 14 (manhole) thereby opening up a channel for possible water entrance" (Jt. App. 30). And in answer to a direct question of counsel for appellee:

Q. "Will you describe more in detail the defects which caused the rejection of the job with reference to Point 14 (manhole)?"

A. The steam pipes and return lines in the drip pit were not covered because there were certain valves and drip fittings in there which you could not cover and still operate. Naturally the steam lines were hot under high pressure. The heat generated in the manhole apparently was caused—when I say "apparently" I don't know—apparently had caused the asphalt to soften up right where the steam pipe entered the manhole, and consequently, there was nothing to hold it, and it began to flow" (Jt. App. 31). Again, "The asphalt was deposited in the bottom of the manhole; there was asphalt in the bottom of the manhole, which was not placed there as part of the contract, and had nothing

to do with the fulfillment of any part of the contract. The end of the pipe was open where it should have been sealed solidly with asphalt."

Q. "And the reason the job was unsatisfactory, as testified, was that water was permitted to get into the pipe.

A. There was an opening there for any form of substance—water and other things" (Jt. App. 31-32).

The method adopted by the appellee in an attempt to waterproof the pipe in the manholes was not sufficient to contain the asphalt and to protect the magnesia where the pre-sealed pipe entered the manhole (Appellant's witness Dubois, Jt. App. 97-100; 110-117).

It was the appellant's duty under its contract with appellee to seal the various field joints and to provide all necessary insulation and waterproofing, in order to provide a continuous insulated and waterproof steam and return line between manholes and between manholes and buildings. However, after the appellant had sealed the joints in the field and left the job, the appellee completed the necessary manholes and the installation of the pipes and fittings therein and insulated the pipes and fittings inside the manholes in accordance with the plans and specifications. The appellee did not notify the appellant that he had completed the construction of the manholes, or to return to the job after he had completed the construction of same and to waterproof the ends of the "Durant" system inside the manholes (Jt. App. 20).

Appellant's superintendent, Hoyle, in charge of appellant's work at the job, testified there were no manholes constructed by appellee while he was on the job, excepting at the boiler house, and that he completed the covering of the field joints (Jt. App. 107-108).

The improper protection given the "Durant System" (plaintiff's pre-sealed pipe) inside the manholes, that is to say; the paper wrapping used by the appellee, and the faulty insulation or no insulation at all made to the fittings and pipes constructed by appellee inside the manholes,

constituted the real cause of the failure, and such negligence cannot be attributed to appellant's material having a latent defect.

In *Carleton v. Jenks*, 80 Fed. 937, 26 C. C. A. 265, (1897), the Circuit Court of Appeals for the 6th Circuit said:

"A suggestion is made in behalf of appellants that the appellees were skilled in their work, and that for that reason they (the appellants) were entitled to rely upon the representations made by the manufacturers, that the fastening was sufficient, and that, their acceptance being founded upon a representation which turned out to be untrue, the appellants are not bound by such acceptance. We are unable, however, to find much force in this suggestion. It might have significance if the question related to the construction of the boiler itself, and applied to inherent defects, or those which were not readily observable to the other party as to the manufacturers; but the matter of the fastenings to the boat was open, and as much exposed to the inspection and judgment of the appellants as to the manufacturers, and the requirements would seem to be as much within the knowledge of the manager, the captain of the boat, and more especially the chief engineer, who had immediate charge of the machinery, as to any one. In these circumstances, the doctrine which the appellants' invoke would not have application." *Dounce v. Dow*, 57 N. Y. 16; *Gurney v. Railway Co.*, 58 N. Y. 359; *Dounce v. Dow*, 64 N. Y. 411.

* * * * *

"No doubt, where there is a warranty, express or implied, on the part of the vendor of goods, the acceptance of them by the buyer does not preclude him from relying upon the warranty. The warranty 'survives the acceptance', and one of the remedies which the buyer has in the case there is a breach of the warranty is to sue the vendor for the damages he has sustained thereby. * * * But that rule has no application to the present case. We have, as already stated, found that here there was no express warranty, and there can be no implied warranty, that the work and materials furnished were suitable and adapted to the purpose in respect to the defect which it is claimed existed here,

where it was open, and as plainly observable to the vendee as it was to anyone.” (Citing for its authority for so holding *Jones v. Just*, L. R. 3 Q. B. 197; *Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup. Ct. 537; *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. 696.) * * * “The subject is fully discussed, and the distinction stated in 2 Story, Cont. §1071 et seq., from which it clearly appears that if the work is open to the inspection of the buyer, and the opportunities for forming a judgment of its sufficiency are open to the buyer as well as to the seller, the rule of caveat emptor applies.”

See also, *U. S., for use and benefit of Brown-Wales Co. v. Leff*, 26 F. Supp. 930 (D. C. D. Mass., 1941) which held:

“The materials were bought by description from Brown-Wales, a dealer in goods of the description ordered, and Brown-Wales knew the purpose for which the goods were required and Larkin relied on Brown-Wales’ skill and judgment in buying the material. Consequently, there was an implied warranty that the material was reasonably fit to satisfy the requirements of the contract concerning the material furnished. C. 106, sec. 17 (1) Mass. Gen. Laws, Ter. Ed. However, the defendant Larkin knew, or should have known, the defects in the equipment and consequently, cannot recover in damages if he used the equipment, as he did here. This is sometimes spoken of as a waiver of breach of warranty.”

Appellant sold its goods to appellee for a particular purpose and also did its work properly, as was required under the contract between the parties. It was not an insurer of the work done by the appellee in the manholes. It did not undertake to guarantee all the work and material supplied by appellee. *Savery Hotel Co. v. Under-Feed Stoker Co., of America*, 178 Fed. 806 (C. C. A. 8th Cir. 1910) (Iowa) (102 C. C. A. 254).

“The purchaser in an executory sale could not rely upon a warranty as to open, plainly apparent defects any more than he could in a sale *in presenti*.” *Day v. Pool*, 52 N. Y. 416 (1873). See also, *Dounce v. Dow*, 57

N. Y. 16 (1874) (which cites *Day v. Pool*, supra), and *American Waste Co. v. St. Mary*, 206 N. Y. S. 316 (1924).

The appellee's failure to properly care for appellant's material on the inside of the manholes, constitutes an act of negligence, and for such act he cannot recover from the appellant. *Standard Oil Co. v. Lloyd*, 159 So. 371, 373; 26 Ala. App. 306, citing *Corpus Juris* 17 C. J. p. 927, note 3.

CONCLUSION.

It is submitted that the Court erred in its judgment for appellee, and that said judgment should be reversed, and a judgment given for appellant on its counterclaim for the sum of \$3,776.95, interest and costs.

Respectfully submitted,

JOHN DILLON FITZGERALD,
226 Woodward Bldg.,

DONALD M. SULLIVAN,
226 Woodward Bldg.,
Attorneys for Appellant.

APPENDIX

UNIVERSITY
OF MICHIGAN

INDEX TO APPENDIX.

	Page
I. Pleadings, Docket Entries and Other Papers Designated	2
Complaint	2
More Definite Statement or Bill of Particulars...	5
Answer and Counterclaim of Defendant Ehret Magnesia Mfg. Co., Inc.	9
Bill of Particulars	14
Reply to Defendant's Counterclaims	15
Findings of Fact and Conclusions of Law	17
Judgment	25
II. Excerpts from Testimony and Proceedings Designated	25
Deposition of C. J. Robin	25
Testimony of Everett D. Gothwaite	42, 95, 108
Testimony of John P. Dubois	92, 97
Testimony of Thomas Hoyle	100
III. Exhibits	122
Excerpts from Exhibit 3	122

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 8868.

EHRET MAGNESIA MANUFACTURING COMPANY,
INC., *Appellant*,

v.

E. D. GOTHWAITE, Trading as National Heating
Company, *Appellee*.

**Appeal from Judgment of the District Court of the United
States for the District of Columbia.**

JOINT APPENDIX.

I.

**PLEADINGS, DOCKET ENTRIES AND OTHER
PAPERS DESIGNATED.**

1

Filed Jan 13 1943

In the District Court of the United States for the
District of Columbia

Civil Action No. 18311

E. D. GOTHWAITE, Fairfax, Virginia, Trading as National
Heating Company, Manassas, Virginia, *Plaintiff*,

v.

EHRET MAGNESIA MANUFACTURING COMPANY, INC. 312
Seventh Street, S. W., Washington, D. C., *Defendant*.

Complaint

(for damages for breach of contract)

Plaintiff, E. D. Gothwaite, respectfully presents to this
Honorable Court:

1. He is an individual doing business under the trade
name of National Heating Company with offices at Ma-
nassas, Virginia, and has his residence at Fairfax, Vir-
ginia; he is of full age and brings this action in his own
right.

2. The defendant, Ehret Magnesia Manufacturing Com-
pany, is a body corporate, having its principal office and
place of business at Valley Forge, Pennsylvania, and main-
taining a branch office through which it transacts business
in the District of Columbia, located at 312 Seventh Street,
S. W.; it is sued in its own right.

3. Jurisdiction of this action is conferred upon this Court
by Title 11, § 306, District of Columbia Code (1940 Edition).

4. On or about December 15, 1941, plaintiff entered into
a certain written contract with the United States of Amer-
ica for the furnishing of certain materials and performance
of certain labor in connection therewith at Langley Field,
Virginia, involving construction of a high pressure steam
distribution system, hot water heating system, and
additions and alterations to boiler rooms, all in ac-

2

cordance with the said contract and the plans and specifications in connection therewith, the same being known as Contract No. W-616-eng.-1639, under Invitation No. 616-42-126—War Department, U. S. Engineer Office, Norfolk, Virginia. By the said contract, plaintiff, among other things, was required to and did guarantee materials and installation of the high pressure steam distribution system to be free of maintenance for one year after completion.

5. On and before December 23, 1941, defendant was fully acquainted with the terms and provisions of the aforementioned Government contract and the plans and specifications in connection therewith and the location and nature of the proposed site of the work. On or about December 23, 1941, plaintiff, relying on defendant's skill and judgment and its representations to him as to the quality, fitness, and performance of certain materials regularly manufactured by it and its partial installation thereof, contracted with defendant for the latter to furnish certain of the said materials and labor of installation thereof in connection with the high pressure steam distribution system portion of the aforementioned Government contract, which materials and installation were included in alternatives provided for in the said Government contract and specifications, all to be furnished by defendant in accordance with the said Government contract and the plans and specifications in connection therewith.

6. Defendant guaranteed and warranted the quality, fitness, and performance of the said materials and installation to be furnished by it for the purposes called for by the aforementioned Government contract and plans and specifications and that the said materials and installation to be furnished by it were to be free of maintenance for one year after completion.

3 7. Defendant proceeded to furnish materials and installation pursuant to its said contract with the plaintiff but wholly failed to perform its obligations with respect thereto under the aforementioned guarantee and

warranties with respect thereto, in that, without fault of plaintiff, a substantial portion of the materials and installation furnished by defendant proved not to be of the quality, fitness, and performance represented to plaintiff and not to be of a quality, fitness, and performance fit for the purposes called for by the aforementioned Government contract and plans and specifications and deteriorated and failed within less than one year from completion, to-wit, on or about August 1, 1942; and in that, although plaintiff promptly notified defendant of the said defects and failures, to-wit, on or about August 4, 1942, and demonstrated the same to defendant, through one of its agents, at that time at the site of the work and made demand upon defendant that its obligations under its contract and guarantee and warranties be fulfilled, nevertheless defendant refused to acknowledge any responsibility for the said failures and continues to refuse to acknowledge any responsibility or make any amends therefor or to perform its obligations aforementioned.

8. As a result of the defendant's failures and refusals aforementioned, plaintiff suffered loss and damages on and incident to his contract aforementioned with the United States of America in the sum of, to-wit, Five Thousand Dollars (\$5,000.00).

Wherefore, plaintiff demands judgment against defendant in the sum of Five Thousand Dollars (\$5,000.00) with costs of this action.

COLLADAY, COLLADAY &
WALLACE

By D. C. COLLADAY
Attorneys for Plaintiff

COLLADAY, COLLADAY & WALLACE
D. C. COLLADAY

1331 G Street, N. W.

Washington, D. C.

Attorneys for Plaintiff

* * * * *

Filed Apr 12 1943

More Definite Statement or Bill of Particulars

Plaintiff, pursuant to the orders of Court made and entered herein February 26, 1943, and March 29, 1943, respectfully presents:

1. The specifications constituting a part of the Government contract referred to in the complaint contained requirement that all of the articles, supplies, equipment, parts, and assemblies thereof, to be furnished by the contractor, of standard manufacture, or for which detailed design requirements were not prescribed in the said specifications, should be guaranteed by the contractor against any failure in proper use of operation, caused by defective material, workmanship, or design, for a period of at least one year from the date of final acceptance of the complete work under the said contract and that failure in any part due to such causes within that time should be promptly and satisfactorily remedied by the contractor without cost to the United States. These specifications, as originally issued, provided for an insulated and waterproof underground steam system, wherein magnesia insulated pipe was to be used, enclosed in tile conduit, which was to be made waterproof, with the tile conduit supported on concrete foundation.

2. By an addendum to the specifications, issued November 1, 1941, it was provided that, as an alternative, Ehret pre-sealed pipe might be used in place of conduit and piping previously specified; that for pre-sealed pipe, road-crossings and cross overs should be made as recommended by the piping manufacturer; that for pre-sealed pipe, expansion loops should be protected as recommended by the pipe manufacturer and that the contractor should assume liability for the proper functioning of the expansion loops; that pre-sealed pipe should be installed as recommended by the manufacturer and should "be guaranteed by the contractor to be free of maintenance for one year after completion".

Moreover, the Ehret pre-sealed pipe in question was an item of standard manufacture. Plaintiff is informed and verily believes and, therefore, avers that the said provisions in the specifications whereby Ehret pre-sealed pipe might be used for the underground system were promulgated by the War Department at the instance of the defendant herein, which became acquainted with the Government invitation for bids and investigated the proposed work and investigated the proposed work and represented that its pre-sealed pipe would provide satisfactorily and at less cost an underground system of the type and characteristics required by the Government.

3. By letter dated November 3, 1941, defendant proposed to plaintiff, with express reference to the Government invitation in question, to furnish certain labor and materials in the outside underground portion of the high pressure steam heating system in accordance with the aforementioned specifications and addendum and the plans related thereto, which were made a part of the said specifications, including performing the work of insulating the field joints, waterproofing foundation walls where the conduit entered buildings or manholes, insulating all fittings and expansion

bends when and where necessary according to design; and defendant by that letter represented its proposed materials and installation to be a perfect and simplified underground system. Moreover, defendant, through its agents, consulted with plaintiff as to the requirements of the specifications and plans for the proposed Government contract and as to the situs of the proposed work, including the inherent characteristics of the location relevant to performance of the proposed contract, and represented to plaintiff that its pre-sealed pipe would provide satisfactorily an underground insulated waterproof steam system as contemplated and required by the specifications and plans. By letter dated December 15, 1941, plaintiff ordered from defendant all pipe and conduit, including expansion loops with pipe and welding fittings, for the under-

ground steam distribution system for the said Government contract, in accordance with the plans and specifications, including addenda, excepting only two lengths of the material already on hand. Defendant, by letter dated December 23, 1941, accepted the order.

4. The materials and installation furnished by the defendant, though the latter had represented that the same would be waterproof, were not waterproof; the purported waterproofing, whether by reason of faulty application or composition or fault of design, on the part of defendant, or for some like cause unknown to plaintiff, disintegrated or separated or otherwise prematurely deteriorated and permitted ground water to attack the piping and insulating material causing disintegration of these, contrary to defendant's representations, warranty, and contract; defendant, contrary to its representations to plaintiff and its contract with plaintiff, likewise failed to waterproof at the foundation walls where the material furnished by it entered buildings or manholes; as a result of the said failures of material and workmanship furnished by defendant moisture from the ground attacked the material and entered

7 through or around the purported waterproofing and rendered certain portions of the installation unfit for continued use, contrary to defendant's representations, warranty, and contract. The portions which failed comprised: (a) 186 linear feet of five inch Ehret "Durant" pre-sealed steam pipe with double standard magnesia covering and a like amount of two and one-half inch Ehret "Durant" pre-sealed wrought iron return pipe with standard magnesia covering, and one Ehret "Durant" pre-fabricated five inch steam expansion loop and one Ehret "Durant" two and one-half inch pre-fabricated return expansion loop; besides (b) an additional 64 linear feet of Ehret pre-sealed pipe in the system, in four other separate locations.

5. With reference to the failures referred to under (a) in paragraph 4 above, the War Department noted indications

of failure and ordered the excavation of that portion of the work for inspection; the War Department examined that material and installation provided by defendant and found that the purported waterproofing part of the material had disintegrated or separated from the balance of the material and that the whole had been penetrated by ground water to an extreme extent and had caused serious disintegration of the insulating material and pipe, and plaintiff examined the same and discovered the same condition; and the War Department determined the extent of damage to be such that they condemned and rejected that portion of the installation and ordered plaintiff to replace it. The War Department, on account thereof, determined the pro rata value of that portion of the system to be \$4,000.00 and deducted that sum from the contract price to plaintiff for the entire Government contract. Plaintiff thereby suffered damage in the said sum of \$4,000.00. With reference to the remainder of the failures, referred to under (b) of paragraph 4 above, the War Department noted indications of failure and ordered the excavation of those portions of

the work for inspection; the War Department examined that material and installation provided by defendant and found that the purported waterproofing part of those portions of the material and installation furnished by defendant had disintegrated or separated from the balance of the said material but that disintegration of the insulating material and pipe had just begun. Plaintiff examined the same and discovered the same condition; and the War Department, as a result of negotiations by plaintiff, concluded not to condemn these portions of the system and instead only required plaintiff to replace the waterproofing in a manner acceptable to them. The cost of this work was as follows: labor of excavating and backfilling \$474.00; labor of rewaterproofing \$276.00; materials for rewaterproofing \$80.00; making a total cost therefor of \$830.00. In addition, plaintiff was compelled to incur and pay the following expenses in connection with the afore-

mentioned additional work: traveling expenses for himself of four trips from Manassas, Virginia, to Langley Field and Norfolk, Virginia, \$96.00; traveling expenses of F. A. Gibson, Superintendent, from Fort Howard, Maryland, to Langley Field, Virginia, \$100.00; incidental office expense, telephone charges, etc., \$12.00; making a total of \$208.00; accordingly plaintiff thereby suffered damage of \$1,038.00 in addition to the aforementioned \$4,000.00, making a total damage sustained by him by reason of defendant's failures and refusals of which he complains of \$5,038.00.

COLLADAY, COLLADAY &
WALLACE

By D. C. COLLADAY
Attorneys for Plaintiff

COLLADAY, COLLADAY & WALLACE

D. C. COLLADAY

1331 G Street, N. W.

Washington, D. C.

Attorneys for Plaintiff.

* * * * *

9 Filed May 17 1943

*Answer and Counterclaim of Defendant, Ehret Magnesia
Mfg. Co., Inc.*

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

This defendant admits that the plaintiff, E. D. Gothwaite, is doing business under the trade name of National Heating Company, with offices in Manassas, Virginia, and that he is of full age. This defendant has no knowledge of the residence of plaintiff. This defendant admits that it is a body corporate and has its principal place of business at

Valley Forge, Pennsylvania, and maintains a branch office through which it transacts business in the District of Columbia at 312 7th Street, S. W., Washington, D. C. This defendant has no personal knowledge as to the date upon which plaintiff entered into a certain written contract with the United States Government, for the furnishing of certain materials and the performance of certain labor at Langley Field, Virginia, but believes that the date as set forth in the complaint, December 15, 1942, is the correct date. Defendant admits that plaintiff had a contract with the United States Government involving the construction of a high pressure steam distribution system, but it has no knowledge whether said contract also contained a provision regarding hot water heating system or additions and alterations to boiler rooms; it admits that the contract between

10 plaintiff and the United States Government, so far as the construction of high pressure steam distribution system is concerned, was known as Contract No. W-616-eng.-1639, under Invitation No. 616-42-126, War Department, U. S. Engineer Office, Norfolk, Virginia. This defendant denies, as alleged in the complaint, that by said contract plaintiff, among other things, was required to and did guarantee the materials of the high pressure steam distribution system to be free of maintenance for one year after completion; but says: that plaintiff was to install the same as recommended by the manufacturer and it shall be guaranteed by the contractor to be free of maintenance for one year after completion.

This defendant admits that on or before December 23, 1941, it was acquainted with the terms and provisions of the contract between plaintiff and the United States Government and of the plans and specifications in connection therewith in so far as the same related to the high pressure steam distribution system, but it has no knowledge of the other terms and conditions of said contract. This defendant has no knowledge whether the plaintiff relied upon defendant's skill and of its representations to him as to the

quality, fitness and performance of certain materials regularly manufactured by defendant. It admits that the plaintiff contracted with the defendant, in that, the defendant was to furnish certain materials and labor for installation in connection with the high pressure steam distribution system portion of the contract between plaintiff and the United States Government; it admits that the materials and installation were included in the alternatives provided for in said contract between plaintiff and the United States Government and of the specifications. Defendant admits that it guaranteed and warranted the quality, fitness and performance of said materials and installation that was furnished by it to be proper for the purpose called for in the aforementioned Government contract and of the plans and specifications. This defendant avers that they were of the quality, fitness and performance as represented by it to the plaintiff. It denies, however, that it

11 guaranteed to the plaintiff that the same were to be free of maintenance by defendant for the period of one year after completion. This defendant further says that the free of maintenance for the period of a year after completion was the obligation of the plaintiff under its contract with the Government and not the obligation of this defendant.

This defendant admits that it proceeded to and furnished the materials and installations pursuant to its contract with plaintiff. This defendant denies emphatically that it failed to perform its obligations with respect to its contract with the plaintiff; it denies that it failed to perform its guaranty and warranty with respect thereto; it denies that the materials furnished, labor expended and the installation made by it under its contract with the plaintiff failed in whole or in part; and it denies that a substantial portion of the materials and installation furnished by the defendant proved not to be of the quality, fitness and performance represented by it to the plaintiff, or not to be of the quality, fitness and performance fit for purpose called for by the

Government contract between plaintiff and the United States Government, and likewise, of the plans and specifications. It denies further that any materials, labor or installation made by it in pursuance to its contract with the plaintiff deteriorated or failed, but on the contrary, stood up as represented by it to the plaintiff. It further denies that the materials furnished by it to the plaintiff, the labor performed, and installation made in pursuance of said contract with plaintiff deteriorated or failed in any respect whatsoever, but on the contrary, says: that this defendant completely complied in every respect with its contract with the plaintiff and that the quality, fitness and performance, labor performed, and installations made in pursuance with its contract with plaintiff was complete in every respect and as represented by it. This defendant denies that as a result of its failure or refusals the plaintiff suffered a loss and damage as alleged in the complaint. This defendant denies each and every other allegation of the complaint and of the more definite statement or Bill of Particulars not otherwise admitted herein. This defendant is advised by counsel that it need not answer the legal conclusions pleaded by plaintiff.

Third Defense

This defendant says: that any failure on the part of the plaintiff to perform his contract with the United States Government was due entirely to plaintiff's own fault or negligence and in nowise to any acts or omissions whatever of this defendant.

Fourth Defense

This defendant says, that in nowise did the materials, labor or installation made by it in connection with its contract with the plaintiff fail or become defective or deteriorate, but if the same failed, or otherwise became defective or deteriorated, then such was due to the plaintiff's fault, negligence, or omission.

Counterclaim

The defendant, Ehret Magnesia Mfg. Co., Inc., asserts a counterclaim against the plaintiff, E. D. Gothwaite, as follows:

1. On or about November 4, 1941, the defendant, Ehret Magnesia Mfg. Co., Inc., at the special instance and request of the plaintiff, E. D. Gothwaite, submitted a proposal or contract to plaintiff for the furnishing by the defendant to plaintiff of certain work, materials, and labor in connection with the installation of a high pressure steam distribution system, at Langley Field, Virginia, and in connection with a certain contract existing between the plaintiff and the United States Government known as Contract No. W-616-eng.-1639, and under an Invitation known as No. 616-42-126—War Department, U. S. Engineer Office, Norfolk, Virginia, for the sum of \$27,500.00 to be paid by said plaintiff to the defendant upon the completion of said work by the defendant.

2. Thereafter on or about, to wit, December 15, 1941, the plaintiff accepted said proposal or contract herein-
13 before referred to, and agreed to pay the defendant therefor the sum of \$27,500.00.

3. That in pursuance to said proposal and the acceptance, aforesaid, the defendant undertook and did perform as agreed in paragraph one hereof, but defendant failed and neglected to pay defendant the entire sum of \$27,500.00.

4. That on account of the foregoing the plaintiff paid to the defendant all but the sum of \$4,012.13, which sum of \$4,012.13, the plaintiff has failed and neglected to pay to the defendant.

5. That there is due and owing to the defendant from the plaintiff the said sum of \$4,012.13 with interest from September 3, 1942, besides costs, in accordance with the Bill of Particulars hereto attached and made a part hereof.

Wherefore, the defendant demands judgment against the

plaintiff in the sum of \$4,012.13, interest from September 3, 1942, and costs.

JOHN D. FITZGERALD,
226 Woodward Bldg.,
Washington, D. C.,
Attorney for Defendant.

* * * * *

14

Filed May 17 1943

Bill of Particulars

This defendant gives as its Bill of Particulars against the plaintiff the following:

		Debit	Credit	Balance
9/30/41	M 26078	192.94		
2/4/42	DIP 17929	2725.00		
2/13	" 18080	2790.00		
2/18	" 18174	2750.00		
2/25	" 18376	3000.00		
3/9	" 18697	3000.00		
3/17	" 18889	3000.00		
4/2	" 19341	2700.00		
4/10	" 19443	3500.00		
4/15	Cash		11265.00	
4/22	DIP 19757	3894.67		
5/21	Cash		7500.00	
5/7	DIP 20384	72.93		
5/20	" 20385	13.59		
6/8	Allowance 2501		22.00	
6/16	Cash		5000.00	
9/3	DIP 23075	72.00		
9/3	" 23076	88.00		

4012.13,

with interest from September 3, 1942, and costs.

JOHN D. FITZGERALD,
226 Woodward Bldg.,
Washington, D. C.,
Attorney for Defendant.

* * * * *

Filed Jun 4 1943

15

Reply to Defendant's Counterclaim

Plaintiff, E. D. Gothwaite, trading as National Heating Company, for reply to the counterclaim of defendant, Ehret Magnesia Manufacturing Co., Inc., filed herein, says that:

1. As to paragraphs 1 and 2 thereof: he denies that defendant on or about November 4, 1941, submitted a contract to him and denies that on or about that date defendant submitted to him a contract or proposal in connection with a certain contract then existing between plaintiff and the United States Government, and he says that the true facts are: that defendant, by letter dated November 3, 1941, proposed to plaintiff that it would furnish for him, in accordance with Invitation No. 616-42-126—War Department, U. S. Engineer Office, Norfolk, Virginia, and the plans and specifications in connection therewith, certain materials and labor of installation thereof in connection with a high pressure steam distribution system proposed to be installed at Langley Field, Virginia, (which proposed system was a part of the work covered by the said Invitation) for the sum of \$27,500.00 to be paid by plaintiff to defendant upon the completion of performance by the defendant; and

16 that thereafter on or about December 15, 1941, plaintiff entered into a certain written contract with the United States of America, including the materials and labor covered by defendant's aforementioned proposal of November 3, 1941, as more fully set forth in paragraph 4 of the complaint herein, which is hereby incorporated by reference; and that on or about the same date, December 15, 1941, plaintiff wrote a letter to defendant wherein he requested defendant to furnish for him for Contract W-616-eng.-1639, Langley Field, Virginia, in accordance with plans and specifications including addenda as prepared by the U. S. Engineers Office, Norfolk, Virginia, (which contract was under the aforementioned Invitation) the materials and labor of installation thereof contemplated by defendant's

said proposal of November 3, 1941, with the exception of two specified lengths of material, for the sum of \$27,340.00; and that thereafter, by its letter dated December 23, 1941, defendant accepted plaintiff's said order of December 15, 1941; and that thereupon the said parties did contract with each other as more fully set forth in paragraphs 5 and 6 of the complaint herein and paragraphs 1, 2, and 3 of plaintiff's more definite statement or bill of particulars herein, which are hereby incorporated by reference.

2. As to paragraph 3 of defendant's counterclaim: he denies the allegations thereof and for further answer here incorporates by reference paragraphs 7 and 8 of the complaint herein and paragraphs 4 and 5 of his more definite statement or bill of particulars herein.

3. As to paragraph 4 of defendant's counterclaim: he denies the allegations thereof and for further answer says that, for the materials and labor of installation thereof which defendant furnished pursuant to their contract
17 aforementioned, he has paid defendant the following sums on the dates respectively shown: April 14, 1942, \$11,265.00; May 20, 1942, \$7,500.00; and June 15, 1942, \$5,000.00; which items correspond with the items of like amount shown in defendant's bill of particulars herein; and that he furnished labor charged against defendant of the reasonable value of \$22.00, which corresponds with the item in that amount shown in defendant's bill of particulars herein as "Allowance 2501"; and that he furnished material from his own stock charged against defendant of the reasonable value of \$42.24, which is not shown in defendant's bill of particulars herein; that the total of the foregoing items is \$23,829.24; that, on the other hand, there were the following items of extra labor in connection with this contract which were allowed by him to defendant: May 7, 1942, \$72.93; May 20, 1942, \$13.59; which items when added to the contract price of \$27,340.00, set forth in paragraph 1 of this reply, yield an aggregate sum of \$27,426.52; that the difference between the said total of contract price and

extra labor allowed and the said total of sums paid and material and labor furnished by him is \$3,597.28.

4. As to paragraph 5 of defendant's counterclaim: he denies the allegations thereof and for further answer says that, by reason of his right to recover of defendant the sum of \$5,038.00, as set forth in the complaint herein and his more definite statement or bill of particulars with respect thereto, there is nothing due or owing by him to defendant but, on the contrary, defendant is at most entitled to have offset against the aforementioned sum of \$5,038.00 the aforementioned sum of \$3,597.28, thereby reducing the amount due from defendant to him to the net sum of \$1,440.72, plus costs of this action.

COLLADAY, COLLADAY &
WALLACE

By D. C. COLLADAY
Attorneys for Plaintiff

COLLADAY, COLLADAY & WALLACE

D. C. COLLADAY

1331 G Street, N. W.

Washington, D. C.

Attorneys for Plaintiff.

* * * * *

19

Filed May 20 1944

Findings of Fact and Conclusions of Law

The Court finds as facts:

1. On or about December 15, 1941, plaintiff, E. D. Gothwaite, operating under the trade name of National Heating Company, with offices at Manassas, Virginia, entered into a written contract with the United States of America for the furnishing of certain materials and performance of certain labor in connection therewith at Langley Field, Virginia, involving construction of a high pressure steam distribution system, hot water heating system, and additions and alterations to boiler rooms, all in accordance with the said con-

tract and the plans and specifications in connection therewith, the same being known as Contract No. W-616-eng.-1639, under Invitation No. 616-42-126—War Department, U. S. Engineer Office, Norfolk, Virginia.

2. The specifications, originally issued on October 13, 1941, provided in part that steam supply and hot water return pipes underground should be placed within a tile conduit supported upon a reinforced concrete base. The defendant, a manufacturer of a re-sealed insulated pipe, approached the Area Engineer, Mr. Ketchum, in charge of the project covered by said contract and requested that the specifications be so amended as to include, as an alternate, the installation of its pre-sealed pipe, and in support of such request represented to Mr. Ketchum that its product was waterproof and if properly installed would require no main-

20 tenance for at least a year. Mr. Ketchum, being of the opinion that the defendant's product was not suitable for use on this project, refused, and the defendant thereupon prevailed upon the office of the Chief Engineer of the War Department in Washington, D. C. to issue instructions to the Area Engineer to include defendant's product in the specifications; and this was done in addendum #5 issued November 1, 1941, which by its terms became a part of the specifications.

3. Section 3-02 (d) of the specifications reads as follows:

“Guarantees. All articles, supplies, equipment, parts and assemblies thereof to be furnished by the contractor, of standard manufacture, or for which detailed design requirements are not prescribed in these specifications, shall be guaranteed by the contractor against any failure in proper use of operation, caused by defective material, workmanship, or design, for a period of at least one year from the date of final acceptance of the complete work under this contract. Failure in any part due to such causes within that time shall be promptly and satisfactorily remedied by the contractor without cost to the United States.”

Section 8-27 of the specifications as amended by Addendum #5 reads as follows:

"Pre-sealed pipe shall be Ehret, Ric-Wil, or equal. No conduit is required for the installation of pre-sealed pipe. It shall be installed as recommended by the manufacturer and shall be guaranteed by the contractor to be free of maintenance for one year after completion. If Ric-Wil insulated pipe units are used, they shall be coupled by lap-welding corrugated conduit as specified by the manufacturer."

4. A contract was entered into between the plaintiff and the defendant (hereinafter called the subcontract) by the terms of which the defendant was to furnish its pre-sealed insulated pipe required outside underground for the high pressure steam heating system, both supply and return, "in accordance with the plans and specifications and addendum #5 issued October 13, 1941". In addition said contract between plaintiff and defendant, among other things, also provided as follows:

"After the insulated pipe has been installed by the mechanical contractor and tested, we will insulate the field joints, that is, where two lengths of pipe are joined together, said joints not to exceed 18" in length;

"Install the water-proofing in foundation walls where the conduit enters buildings or manholes;

21 "Insulate all fittings and expansion bends, when and where necessary according to design.

"Durant Insulated Pipe will not be run further than the inside of manhole walls in manholes."

By the language here quoted from a letter of the defendant addressed to the plaintiff, which formed a part of the correspondence constituting the subcontract, the specifications were incorporated into the subcontract by reference, and became a part thereof.

5. Prior to entering into such subcontract the defendant was duly acquainted with the terms and provisions of the aforementioned Government contract and the plans and specifications in connection therewith, and with the location and nature of the proposed site of work.

6. Under said subcontract the defendant undertook to and did furnish certain "pre-sealed" pipe units of its own manufacture, said pipe units consisting of steel and wrought iron pipe insulated on the outside with a certain thickness of magnesia, which in turn was covered by approximately a one-inch thickness of asphalt, over which was a galvanized metal casing. The units were manufactured and delivered on the job in lengths of approximately twenty feet, with the pipe protruding at each end for several inches to allow for welding the ends together. Under said sub-contract the duty of the plaintiff was to lay said units in trenches prepared by it and to weld the various lengths together and test the welds. The duty of the defendant was to seal the various field joints and to provide all necessary insulation and waterproofing, in order to provide a continuous insulated and waterproof steam and return line between manholes and between manholes and buildings. The plaintiff prepared the necessary trenches and laid and welded the pipe, and tested the welds; and the defendant thereafter, acting on its own responsibility and exercising its own independent judgment, sealed the field joints by installing the insulation and waterproofing. After the defendant had sealed the joints in the field and left the job, the plaintiff completed the necessary manholes and the installation of the pipes and fittings therein and insulated the pipes and fittings inside the manholes in accordance with the plans and specifications. The plaintiff did not notify the defendant that he had completed construction of the manholes, or to return to the job after plaintiff had completed the construction of same and to waterproof the ends of the Durant system inside the manholes.

7. Defendant had represented its pipe units to be "permanently waterproof" and the insulation protection to be "absolutely dependable", and plaintiff had relied on such representations of the defendant and further had relied upon the defendant's skill and judgment in the manufacture of its said pipe units and the defendant's partial installation thereof.

8. After completion of the work called for by said Government contract, and before the job had been accepted by the Government, it was found upon inspection by Government engineers and inspectors that when the steam had been turned on the heat in the manholes emanating therefrom had melted the asphalt waterproofing of the pre-sealed pipe where it terminated inside the manholes and some of said asphalt had not remained in place but had run out into certain of the manholes. As a result, surface water entered into the pre-sealed pipe through pouring slots which were located at about two foot intervals along the top of the pipe-line thereby wetting the magnesia insulation. This resulted in heat reaching more asphalt farther along the line, thereby melting the same and causing it to flow, some into certain manholes and some out of various pouring slots.

9. The trouble originated at the inside wall of the manholes where the pre-sealed pipe ended, and resulted from a failure to properly seal off or bind the asphalt waterproofing material in such a manner as to prevent its
 23 flowing when it became heated, as set forth in finding 8, and as the insulation was exposed by the flowing away of the asphalt the trouble progressed due to the insulation becoming wet both from the water entering the manholes from the surface and the water entering the pre-sealed pipe through the pouring slots as the latter became opened when the asphalt flowed into the manholes.

10. The Government required the plaintiff to dig up a portion of the underground line, which had been back-filled, and it was found that the pre-sealed pipe had deteriorated

as above described for a distance of about 186 feet; and this portion of the line the Government rejected and abandoned, and required the plaintiff, under the guarantees contained in the specifications and quoted in paragraph No. 3 hereof, to install a new and different type of steam line in place thereof at the actual cost to him. As a result of the abandonment of this portion of the line the Government deducted \$4000.00 from the contract price. Plaintiff was required by the Government to make repairs to correct such failure of the said pre-sealed pipe at other points in the system in order to make the job acceptable to the Government; and he did make such repairs, furnishing therefor materials and labor at a cost to him of One Thousand Thirty-eight (\$1038.00) Dollars.

11. Plaintiff demonstrated to the defendant, through one of its agents at the site of the work, the said failure of its materials and installation as indicated in paragraphs eight and nine hereof, and made demand upon defendant that the guarantees contained in the specifications be fulfilled by the defendant; but defendant refused to acknowledge responsibility for said failure or to make any amends therefor.

12. The melting and flowing of the asphalt waterproofing material in the pre-sealed pipe when subjected to heat constituted a latent defect which could not have been discovered by the plaintiff upon examination and without actual test in operation. This latent defect was or should have been known to the defendant.

24 13. It was the obligation of the defendant to properly seal off the insulation and waterproofing where the pre-sealed pipe terminated inside the manholes so that the asphalt would not run when heat was applied to the steam line, or, in the alternative, to have warned the plaintiff of said latent defect and advised him as to what was necessary to be done to prevent the asphalt from leaving the pipe.

14. As a result of the aforementioned failure of the pre-sealed pipe as installed by the defendant and of the defen-

dant's failure and refusal to make amends therefor, plaintiff suffered loss and damage on and incident to the said Government contract in the total sum of Five Thousand Thirty-eight (\$5038.00) Dollars, which amount the plaintiff is entitled to recover from the defendant.

15. Plaintiff had withheld from the defendant the sum of Three Thousand Seven Hundred Seventy-six and 95/100 (\$3776.95) Dollars of the price due the defendant for materials purchased and labor involved in their installation, for which sum the defendant is entitled to a set-off on his counterclaim against the plaintiff, leaving a balance due the plaintiff in the sum of One Thousand Two Hundred Sixty-one and 05/100 (\$1261.05) Dollars, for which sum the plaintiff is entitled to a judgment.

The Court concludes as a matter of law:

1. The plans and specifications having been incorporated in the subcontract by reference, the defendant was bound by the guarantees provided in section 3-02 (d) and in section 8-27 of the specifications as amended, including the provision that all articles, supplies, equipment, parts and assemblies thereof shall be guaranteed against any failure in proper use of operation caused by defective material, workmanship or design for a period of at least one year from the date of final acceptance of the complete work under the aforementioned Government contract. The
25 failure of the materials and installation furnished by the defendant constituted a breach of the said subcontract on the part of the defendant for which the plaintiff is entitled to recover his damages.

2. The defendant as a subcontractor under a principal contract between the plaintiff and the United States of America impliedly assumed all of the obligations and liabilities of the principal contract in so far as it related to the materials and workmanship undertaken and performed by the defendant; and as such subcontractor the defendant impliedly undertook to furnish materials and make partial installation thereof subject to the condition that its mate-

rials and installation would be guaranteed against any failure in proper use of operation for a period of at least one year from the date of acceptance of the complete work under said Government contract. The failure of the materials and installation furnished by the defendant constitutes a breach on the part of the defendant of the guarantees contained in the specifications, for which the plaintiff is entitled to recover his damages.

3. The defendant, having full knowledge of the purposes for which its material and installation were to be used, and the plaintiff having relied on the skill and judgment of the defendant in the manufacture and partial installation thereof, and from the facts in this case necessarily having had to rely on the defendant's skill and judgment, there is an implied warranty that the defendant's material and installation would be free from latent defects and fit and satisfactory for the uses and purposes for which they were intended; and the failure of the defendant's materials and installation under actual tests of operation, such failure being due to a latent defect known to the defendant but which could not have been discovered by the plaintiff upon examination of the materials, constitutes a breach of

26 implied warranty on the part of the defendant, for which the plaintiff is entitled to recover his damages.

4. The plaintiff is entitled to recover from the defendant damages in the total sum of Five Thousand Thirty-eight (\$5038.00) Dollars, less Three Thousand Seven Hundred Seventy-six and 95/100 (\$3776.95) Dollars, which latter amount the defendant is entitled to have set off on its counterclaim against the plaintiff, leaving a balance for which sum the plaintiff is entitled to a judgment, of One Thousand Two Hundred Sixty-one and 05/100 (\$1261.05) Dollars, plus his costs in this proceeding.

JESSE C. ADKINS

Justice.

* * * * *

Filed May 29 1944

Judgment

Upon consideration of the pleadings and the evidence, of the findings of fact and conclusions of law entered herein this 29th day of May, 1944, which findings and conclusions are incorporated herein and by reference made a part hereof, and it appearing that this cause is now before the Court for final judgment, it is by the Court this 29th day of May, 1944,

Adjudged, Ordered and Decreed that the Plaintiff recover from the Defendant damages in the total sum of Five Thousand, Thirty-eight (\$5,038.00) Dollars, less a set-off in the sum of Three Thousand, Seven Hundred Seventy-six and 95/100 Dollars (\$3,776.95) on Defendant's counter-claim against the Plaintiff, and that the Plaintiff shall, and by this order has a final judgment in the sum of One Thousand, Two Hundred Sixty-one and 05/100 Dollars (\$1,261.05), plus the costs of this proceeding as they may be taxed by the Clerk of the Court.

JESSE C. ADKINS

*Justice.***II.****EXCERPTS FROM TESTIMONY AND PROCEEDINGS DESIGNATED.**

Deposition

30

C. J. Robin

* * * * *

31

Q. What is the general character of work you have been doing with the Army Engineers? A. Prior to July, 1941, it was in connection with river and barbor work entirely.

Q. Will you be a little more specific than that. The type of engineering work you devoted yourself to was what? A. Heavy concrete work.

Q. That was prior to 1940? A. Prior to July, 1941. Since then it has been construction of facilities for the war,

housing and necessary utilities and airfield construction.

Q. Does that include installation construction of heating plants? A. In connection with the housing, yes.

Q. What is the nature and extent of your experience with reference to the construction and installation of heating plants? A. Only what is necessary in the construction of a heating plant for barracks and allied structures of that kind.

Q. Have you had occasion to do any work in connection with the heating plant at Langley Field? A. Yes.

Q. Are you familiar with the contract for the installation of such heating plant as was let by the War Department to the National Heating Company, known as No. 32 W-616-eng-1639? A. I don't remember the number of the contract.

Q. I hand you contract which has been initialed by the Pre-Trial Justice of the District Court of the United States for the District of Columbia, which purports to be a contract between the War Department, U. S. Engineer Office, Norfolk, Virginia, and National Heating Company, for the construction of a High Pressure Steam Distribution System and other things, at Langley Field, Virginia, and ask you if you are familiar with that contract? A. Yes; I am.

Q. There are certain addendums attached thereto, I think five, and a set of specifications; are you familiar with those addendums and those specifications? A. At the time of the work I was quite familiar with them and with some of the details.

Q. This contract provides for the installation of certain steamheating equipment, does it not?

Mr. Fitzgerald: I object to the question as leading. I think the witness should state what it does provide.

Q. (By Mr. Pratt) Will you answer the question? A. The contract does.

Mr. Fitzgerald: Another objection—that the witness, after a cursory examination of the papers, indicated his answer.

33 Mr. Pratt: I object to the statement of counsel going into the record. The witness has stated that that is the contract, and it is stipulated that the contract may go into the record.

Mr. Fitzgerald: You are interrogating the witness on the contents of the contract. The contract should be exhibited to the witness, and the things that you wish to bring to his attention should be stated.

Q. (By Mr. Pratt) Does the contract, or not, provide for the steam heating equipment at Langley Field? A. It does.

Q. And are you familiar with the installation which was made pursuant to that contract? A. Yes.

Q. Did you inspect it? A. Personally, no, sir, except on certain occasions.

Q. But you did inspect it on certain occasions? A. Yes.

Q. What was your official position at the time the installation was made? A. I was area engineer.

Q. What were your duties? A. I was in charge of all construction at Langley Field at that time, under the supervision of the United States Engineer Office, Norfolk, Virginia.

34 Q. And did this installation of steam heating equipment under this contract come under your supervision? A. Yes.

Q. What was the system of making inspections of this installation? A. I had inspectors assigned to the job who were constantly on that particular job.

Q. And did they report to you? A. They made daily reports to me.

Q. Daily reports? A. Written reports.

Q. Was the work called for in this contract completed? A. Yes.

Q. Was it satisfactorily completed? A. Yes.

Q. Was the full contract price paid to the contractor for this installation, if you know? A. As far as I know, yes.

Q. During the performance of this work, there were certain change orders issued; I hand you what purports to be

a letter dated June 11, 1942, signed by R. R. Neyland, Lieutenant Colonel, Corps of Engineers, District Engineer, Fort Norfolk, and ask you if you know the purpose of the issuance of that letter? A. I do.

35 Q. What was the purpose of issuing the letter, and what was the reason for it? A. The reason was to permit a period of study to determine what course to pursue in connection with certain phases of the contract.

Q. What necessitated that study, if you know? A. The failure of a certain portion of the steam line that had been installed.

Q. I understood you to testify a few moments ago, Mr. Robin, that the job was completed satisfactorily? A. Yes.

Q. Now, you testify that there was some failure in the steam line which had been installed; will you explain what appears to be inconsistent answers? A. When you asked if the contract had been completed satisfactorily, this paper and this statement which I know were later issued, are a part of the contract.

Q. I hand you another document, which purports to be a letter dated October 16, 1942, signed by W. W. Lapsley, Lieutenant Colonel, Corps of Engineers, District Engineer, dated at Fort Norfolk, and which also contains the signature of National Heating Company, by E. D. Gothwaite, and ask you to state what it is? A. That is a supplement to the previous paper which you handed me.

36 Mr. Fitzgerald: The letter as now exhibited to the witness I will have to object to unless it is here shown, or subsequently shown, that the contents of that letter and the reasons were made known to the defendant.

A. It outlines additional work that was to be performed as a part of the contract.

Q. (By Mr. Pratt) Is your answer complete? A. I think so.

Q. Isn't there some deduction from the contract price considered in that letter? A. Yes; as a part of the instrument, it provides for a certain deduction from the original contract price.

Q. In what amount? A. \$4,000.

Q. Do you know why that deduction was made?

Mr. Fitzgerald: Personally, of your own knowledge?

A. Yes.

Q. (By Mr. Pratt) Why was it made? A. It was made because a certain portion of the work described here between the reference points numbers 13 and 15, the fulfillment of that part of the contract was never obtained by the Government, and it was not completed.

Q. Why wasn't it completed—in what respect? A. It was not completed to the satisfaction of the Government; it was not fulfilled according to the contract.

37 Q. Was the work in completed form offered to the Government for acceptance? A. It was.

Q. And it was accepted? A. It was not accepted.

Q. Why wasn't it accepted?

Mr. Fitzgerald: Objected to unless he knows of his own knowledge.

Mr. Pratt: If he doesn't know, he can say so.

A. It was not accepted because the condition of the work didn't meet the requirements in the specifications and contract.

Q. (Mr. Pratt) In what respect, if you know, was the work defective? A. It was defective in that a certain drip pit—I don't recall the number—

Q. Before we go on with that, maybe we had better have another exhibit. Mr. Robin, you have examined the contract, with certain addendum and a specification with two letters I have shown you; do I understand the statement previously made to mean the two letters constitute a part of the contract? A. Yes.

Q. So you have examined now the complete contract with this amendment, have you not?

38 A. I would say not, as this change was No. 5, so there must have been 1, 2, 3, and 4.

* * * * *

40 Q. (By Mr. Pratt) Will you answer my previous question as to and in what respect the installation which was completed and offered to the Government for its acceptance was not satisfactory, and defective.

* * * * *

41 A. The reason the contract was not accepted as being complete was because the asphalt seal around the pre-seal pipe had moved, flowing into drip pit No. 14, thereby opening up a channel for possible water entrance.

Q. (By Mr. Pratt) Was that the only defect which you found—

Mr. Fitzgerald: I object to Mr. Gothwaite pointing out to the witness.

Q. (By Mr. Pratt) Was that the only defect you found?

A. That is the only one I personally looked at, as I remember. Drip pit No. 14 is the drip pit immediately adjacent to Dodd Boulevard in front of the Post Exchange.

Q. Will you state if that is the only defective installation that you personally examined and found to be defective?

A. Yes.

Q. But you did have two engineers who reported to you daily? A. Yes.

Q. And those reports were made to you in regular
42 course of their duty? A. Yes.

Q. Will you state what other defects were found in this system and reported to you by these engineers who worked under your supervision?

Mr. Fitzgerald: I object to this as it is not the best evidence; the best evidence of the purported defects that may appear to have occurred should be testified to by those who actually saw them.

A. Without taking the records, I do not know any answer I could give to that which would be worth much.

Q. (By Mr. Pratt) Will you kindly inspect your records and give us the answer? A. That is something I do not have personal access to. Those records belong to the Government.

Q. For the time being, I withdraw that question. As the result of the defects which you have described, tell me whether or not any action was taken to reject the installation covered by this contract? A. As soon as the condition that I described was noted (that is the moving of asphalt from the pipe into the bottom of the drip pit), the contractor was notified of it so that he could correct that condition, because it would not be acceptable to the Government in that condition. Naturally the next move was then up to the contractor.

Q. Did the contractor get in touch with you concerning the matter? A. Yes; he did. When, or
43 under what circumstances, I, of course, do not recall. I suppose Mr. Gothwaite was there, but I do not particularly remember. Mr. Gothwaite was not on the job daily, but he had a superintendent who was, and we discussed daily such matters.

Q. What was his name? A. Gibson.

Q. Will you describe more in detail the defects which caused the rejection of the job with reference to point 14?

A. The steam pipes and the return lines in the drip pit were not covered because there were certain valves and drip fittings in there which you could not cover and still operate. Naturally the steam lines were hot under high pressure. The heat generated in the manhole apparently was caused—when I say “apparently” I don’t know—apparently had caused the asphalt to soften up right where the steam pipe entered the manhole, and, consequently, there was nothing to hold it, and it began to flow.

Mr. Fitzgerald: I move that the latter part of the answer be stricken because of the witness’ qualification. I do not know the matter of conclusion on his part is a statement of fact.

Q. (By Mr. Pratt) Proceed, Mr. Robin. A. The
44 asphalt was deposited in the bottom of the manhole; there was asphalt in the bottom of the manhole, which was not placed there as any part of the contract, and

had nothing to do with the fulfillment of any part of the contract. The end of the pipe was open where it should have been sealed solidly with asphalt.

Q. And the reason the job was unsatisfactory, as testified, was that water was permitted to get into the pipe? A. There was an opening there for any form of substance—water and other things.

Q. Did you have occasion to confer with Mr. Gothwaite concerning this matter and what he had done with reference to correcting it? A. Undoubtedly Mr. Gothwaite, on one of his trips, came up to the office about trouble that he had. The conference that you are possibly referring to had nothing to do with the conditions which existed at that time.

Q. Do you mean you do not recall ever conferring with Mr. Gothwaite concerning this defect? A. No, sir; I don't recall it. It is entirely possible that he was there at Langley Field. I don't remember.

Q. Did you have other conferences concerning this particular defect with anyone? A. Oh, yes; with his superintendent and with my superintendent. I have had frequent conferences.

45 Q. Did you have any conference with his superintendent, or with your superintendent, concerning any other feature?

Mr. Fitzgerald: I object to that question and object to the answer to the previous question unless it is shown the defendant or defendants' representative was present at any conference had between the witness and Mr. Gothwaite or the witness' subordinate with Mr. Gothwaite, or with anyone representing Mr. Gothwaite. A. We discussed similar conditions that existed—

Mr. Fitzgerald: I object to that as not responsive to the former question, and I also object to the witness answering the question unless he was present himself.

Mr. Pratt: I asked him if he had conferences, and he said that he did. I think it is responsive, and he is telling us what happened.

Witness: I had conferences with my job superintendent and the contractor's superintendent in connection with similar conditions at other drip pits.

Q. (By Mr. Pratt) Do you know whether a representative of the Ehret Magnesia Manufacturing Company was present at any of those conferences? A. I don't recall.

Q. Isn't it a fact, Mr. Robin, that a representative
45 of the Ehret Magnesia Manufacturing Company was present in the first week in September at a conference attended by you concerning the defect at point No. 14 and at other drip pits?

Mr. Fitzgerald: I object to the question as it has been suggested by the witness that he doesn't recall.

A. There was a representative of theirs on the job.

Q. (By Mr. Pratt) What was his name, do you know? A. I don't recall his name.

Q. Do you recall whether Mr. Drobar was present? A. Yes; I believe that is his name, but I would not be sure.

Q. Was Mr. Gothwaite present? A. Yes; Mr. Gothwaite was present.

Q. So there was a conference held concerning these defects, at which the defendant in this case, the Ehret Magnesia Company, was represented and the plaintiff was represented and you were present? A. Yes. 1942 is correct.

Q. The subject of unsatisfactory installation here was a subject which was pretty much alive at that time? A. It was.

Q. What was the situation which caused this conference to be brought about?

Mr. Fitzgerald: I object to anything beyond point 14.

The witness has suggested to one of the questions
47 that he was only personally familiar with point 14.

Mr. Pratt: This witness was the area engineer and he got daily reports, and he must have been familiar with the entire job. In his responsible position as area engineer he has someone to report to him.

Mr. Fitzgerald: I object to any testimony by the witness, whether an area engineer, or not—anything that he has no personal knowledge of, and it is not the best evidence. The best evidence is from those who had personal knowledge of it, and the witness stated that he only had personal knowledge of point 14, and his answer should be confined to point 14.

Q. (By Mr. Pratt) You may testify to the substance of the reports.

Mr. Fitzgerald: He would have to exhibit these reports. The witness cannot, from his own recollection, testify to the contents of the reports. He has already stated that he doesn't have them available, and, consequently, he cannot refresh his recollection unless he has the documents, and they cannot be introduced in evidence unless they are properly authenticated.

Q. (By Mr. Pratt) Now, will you please answer the question? A. The condition I described as asphalt accumulating in the bottom of pit 14 went on until one day (I 48 do not recall the date) I was advised by my superintendent that a failure of some kind had occurred in the line adjacent to point No. 14. When I went there I discovered the ground thoroughly saturated with water adjoining drip pit 14, and at one point a little fountain of steam coming up out of the ground.

Q. Was that the time you called this conference? A. Yes; the conference was subsequent to that.

Q. Did you call the failure of that line to the attention of the contractor? A. We did.

Q. Did you do it personally? A. I don't remember.

Q. Do you recall you issued direction that it be done? A. That it be called to his attention?

Q. Yes. A. He was advised of it, but how I do not recall.

Q. You mean Mr. Gothwaite? A. Yes.

Q. What steps did you take to ascertain the nature of this failure? A. Mr. Gothwaite, or his men, excavated—

Q. What steps did you take? A. The job was not accepted by us; the Government was not accepting the job.

When the contractor was advised of the condition,
49 he had to do something.

Q. Did you make any suggestions or issue any instructions or requests to him? A. It was suggested at a joint conference.

Mr. Fitzgerald: By whom?

Witness: I don't recall.

Mr. Fitzgerald: By whom?

Witness: I don't recall.

Mr. Fitzgerald: I object as not responsive to the question.

Q. (By Mr. Pratt) You don't remember whether you did anything about it? A. That is right.

Q. Did you participate at conferences in which decisions were made what should be done about it? A. Yes.

Q. Can you recall the time of any such conference? A. No closer than the late summer or possibly early fall of 1942.

Q. Who was present at that conference? A. I don't remember.

Q. Do you remember whether Mr. Gothwaite was present? A. At certain times in connection with the work Mr. Gothwaite and the representative of the Magnesia Company, both were on the job.

50 Mr. Fitzgerald: I object to the question, and move that the answer be stricken as not responsive.

Q. (Mr. Pratt) You say certain decisions were made: What decisions were made at the conference as to what could be done with reference to the failure? A. One decision was to excavate the area in the vicinity of the expansion loop which was immediately adjacent to drip pit 14.

Q. And was such excavation undertaken? A. Yes.

Q. By Mr. Gothwaite? A. Yes.

Q. Did you inspect the work after the excavation was done? A. I did.

Q. What did you find? A. We found the asphalt seal had moved so that openings had formed large enough for

my hand to be inserted into the pouring holes to a point beyond the expansion loop adjacent to pit 14.

Q. That was the result of what?

Mr. Fitzgerald: I object as not qualified.

Q. (By Mr. Pratt) If you know. A. I don't know.

Q. Following the excavation, what was done? A.
51 I don't remember the sequence of events.

Q. Was the job left as it was, or was something done about it? A. There was a conference held in the District Office with the contractors.

Q. Were you present? A. Yes.

Q. What was decided at that conference?

Mr. Fitzgerald: I object unless the defendant or his representative was present at the conference.

Q. (By Mr. Pratt) If you were present. A. I was present at the conference and a plan was proposed whereby the underground line at that particular location would be eliminated and a concrete steam trench substituted in its place.

Q. Was the elimination of that underground line the factor which resulted in the reduction of the contract price?

Mr. Fitzgerald: I object to the question as being leading.

Mr. Pratt: He has already testified as to the reduction.

A. The elimination of that line led to the reduction in the contract price.

Q. (By Mr. Pratt) Did you participate in conferences, or in a conference, at which the reduction contract price
52 was passed upon? A. Yes.

Mr. Fitzgerald: I object to the question and answer, and ask that the answer be stricken, unless there was present at the conference a representative of the defendant.

Q. (By Mr. Pratt) Who was present? A. Mr. Gothwaite, the contractor, was present; Mr. Maddey, the principal engineer for the Norfolk District, was present. I do not recall the others.

Q. Do you recall whether Mr. Drobar was present? A. My recollection is Mr. Drobar was not present.

Q. Do you know whether Captain George was present? A. I do not recall.

Q. Do you know whether any other excavations were made by Mr. Gothwaite than the ones adjacent to pit 14?

Mr. Fitzgerald: Of your own personal knowledge.

A. I don't remember.

Q. (By Mr. Pratt) Can you say definitely that no other excavations were made? A. No, sir.

Q. I understood you to testify that it was among your duties to make inspection of all construction work before it was accepted? A. Yes, sir.

53 Q. And you did inspect this installation? A. Yes.

Q. And that it was not acceptable? A. Yes.

Q. And conferences were held there with the result that a certain line which you have testified to was abandoned?

Mr. Fitzgerald: I object as leading.

Q. (By Mr. Pratt) —was abandoned or omitted, and the contract price was reduced by \$4,000 as the result of what you testify to? A. Yes.

Mr. Fitzgerald: I object, and move that the answer be stricken out on the ground that it has already been testified to, and that the question is leading.

Q. (By Mr. Pratt) Can you testify as to whether, except for this substitution of a new line adjacent to pit 14, the contract was otherwise performed and the installation otherwise acceptable and satisfactory?

Mr. Fitzgerald: Of your own personal knowledge.

A. It was completed and accepted.

Q. (By Mr. Pratt) Did you have occasion, when you found the defect near and at pit No. 14, to question whether or not the installation in other respects might be defective?

Mr. Fitzgerald: I object unless he identifies to whom, and whether a representative of the defendant was
54 present. I further object to it as being leading.

Q. (By Mr. Pratt) Answer it, please. A. The question naturally arose as to what the condition was at other drip pits in the installation which was almost identical.

Mr. Fitzgerald: I object as the witness has stated that he had no personal knowledge of other things beyond point No. 14.

Q. (By Mr. Pratt) Did you undertake an inspection of other points than pit No. 14, as the result of that question arising? A. Yes; I remember very distinctly looking at pit No. 18.

Q. (By Mr. Pratt) And what did you find at pit No. 18?

Mr. Fitzgerald: Same objection, and that the answer be stricken.

Mr. Pratt: He said he inspected No. 18, and I want to know what he found.

Witness: I don't remember that we found anything out of the way at that pit. This No. 18 may not be the correct number, but there is a drip pit at the corner of that building.

Q. (By Mr. Pratt) Did you inspect any of the other drip pits? A. Not to my recollection.

55 Q. Did you have them reported by the men under your supervision? A. Yes.

Q. And did they report to you any defects?

Mr. Fitzgerald: I object on the ground that the best evidence is the signed statement, and that the witness would be answering purely hearsay evidence.

A. I was told by my superintendent that in some of the drip pits (I don't remember which ones or how many) the asphalt had left the pipe to the extent that he was able to push a small stick, possibly as big as your finger, into the pipe.

Mr. Fitzgerald: I move that the answer be stricken for the same reason as stated in the objection above, and being entirely hearsay and not the best evidence; those having knowledge of it should be produced as to what they had seen. Furthermore, I move to strike out all answers formerly made to all questions by the witness which are based entirely upon hearsay, which objection was heretofore made.

Q. (By Mr. Pratt) Notwithstanding the objection, Mr. Robin, were any requirements made of the contractor, Mr.

Gothwaite, as to repairs or changes in the installation, by your office, by you or under your supervision, as the contract was finally completed and the work accepted, 56 that you know of?

Mr. Fitzgerald: I object unless he knows of his personal knowledge.

A. The contractor was advised that he would have to provide a means of holding the asphalt in place in the pipe, before the contract could be accepted.

Q. (By Mr. Pratt) At all points? A. At all similar installations, wherever the asphalt left the pipe, either by softening or otherwise.

Mr. Fitzgerald: I move that the answer be stricken for the same reasons as stated; and again for the further reason that the answer is too general and not specific.

Q. (By Mr. Pratt) Are the inspectors who worked under your supervision available for questioning? A. My superintendent is still employed by the Government.

Q. Where is he located—out here? A. No; he has an office at Camp Patrick Henry.

Q. Where is that located? A. About eight or ten miles above Newport News, on the other side of the Roads.

Q. Do you know whether Mr. Gothwaite undertook to do any work in connection with the re-waterproofing or carrying out of the advice given him by your office, that he would have to make this work satisfactory? A. Mr. Goth- 57 waite corrected the conditions to our satisfaction. I will qualify that by saying someone in Mr. Gothwaite's employ.

Q. When refer to Mr. Gothwaite, you are referring to the National Heating Company, are you not? A. Yes.

Q. Now, Mr. Robin, coming back to the excavation at pit 14, did you examine that pipe after the excavation was done? A. Yes.

Q. I think I asked you what you found, and you said the asphalt flowed out of the pipe into pit 14. A. The asphalt was in the bottom of pit 14. I assume it flowed from out of the pipes.

Q. How far back from pit No. 14 in the pipe was the asphalt missing when the pipe was excavated? A. The asphalt had moved beyond the end of the expansion loop.

Q. About how many feet? A. Approximately 25 feet, I guess.

Q. Isn't it a fact that the asphalt had deteriorated and disappeared all the way between 13 and 14?

Mr. Fitzgerald: I object to the question as leading.

A. I don't remember how far back it went on both
58 sides of pit No. 14.

Q. (By Mr. Pratt) Did you detect any other defect in the asphalt or waterproofing other than the fact that the asphalt melted and ran into pit 14? A. Yes, the magnesia covering had deteriorated. It was wet and unfit in its condition at that time for use as a covering for steam pipes.

Cross-Examination

By Mr. Fitzgerald:

* * * * *

63 Q. Now, did you examine that pit or manhole indicated on Plaintiff's Exhibit No. 4 near No. 14, between Dodd Boulevard and the expansion loop, before it was filled in by dirt? Did you personally examine it? A. Examine the box?

Q. The whole thing filled in? A. Yes; I examined it a number of times.

Q. Did you observe at any time that it was filled with water? A. The interior of the pit?

Q. The interior of the pit. Strike that out. Did
64 you at any time before it was filled in by dirt find water in the manhole or pit? A. I don't remember that there was water inside of the pit.

Q. There could have been water in there, and you not know it, of course? A. Yes.

Q. The Durant System would be laid and connected up to the exterior, as distinguished from the interior of the

pit or manhole, would it not? A. I don't remember the construction, the joining of the two—the details of the joining of the concrete and pipe.

Q. The Durant System, after it is placed in the ditch, would be hooked to the manhole, would it not, or be pushed into the manhole? A. Yes.

Q. Who would be responsible, do you know, if you know of your own knowledge, either under the contract with the Government and Mr. Gothwaite, and the contract of the defendant and the plaintiff, Mr. Gothwaite, as to the sealing of that Durant pipe as it joined the manhole, before it goes into the manhole?

Mr. Pratt: That calls for an opinion of a lay witness as to the meaning of the Government contract, and I object.

A. So far as the Government is concerned, we
65 hold the National Heating Company.

Q. (By Mr. Fitzgerald) And by that you mean the plaintiff? A. Yes; Mr. Gothwaite.

Q. When you went down there and before the dirt was filled in over that manhole, did you make personally any inspection as to the Durant System at that manhole? A. Immediately prior to filling the excavation, I do not remember making an inspection.

Q. And that, of course, applies to all the other points that you have referred to in your testimony? You only had personal knowledge, as a matter of fact, of No. 14—that you have seen yourself? A. As far as inspections are concerned, I have made inspections of other parts of the system.

Q. You made an inspection of 14 before the dirt was filled in? A. Sometime prior to filling it in.

Q. Did you find it, at that inspection, to be all right? A. So far as could be seen, it looked like it was all right.

Mr. Fitzgerald: I think that is all.

66 Re-Direct Examination

By Mr. Pratt:

Q. I hand you Defendant's Exhibit No. 1, and call your attention to page 1 in the box, in the lower left-hand corner of that page,—some representations concerning Durant insulated pipe. Will you read the first representation? A. "No. 1, permanently waterproof."

Q. When the excavation was made to uncover this installed Durant pipe at or near point 14, did you find the pipe was waterproof? A. The insulation on the pipe was soaked.

Q. It was not waterproof? A. No, sir; that wasn't.

Q. Did you find any corrosion or deterioration in the installation of the pipe? A. There was no apparent corrosion which would indicate something wrong with the metal, but so far as deterioration is concerned, the magnesia covering around the pipe had become thoroughly soaked and deteriorated, to where it was not usable.

Q. There is a representation No. 2; will you read that, on page 1? A. "Elimination of electrolysis and corrosion."

Q. Will you read No. 3? A. "Requires no sub-drains as even complete water submersion does no harm."

67 Q. Did you find that time had caused it by dampness or water getting into the insulation of this pipe? A. The insulation, which is the magnesia covering, it had deteriorated completely.

* * * * *

Testimony

72 **Everett D. Gothwaite**

* * * * *

Direct Examination

By Mr. Pratt:

* * * * *

76 Q. Now, Mr. Gothwaite, will you explain in a general way the nature of the work you had to do to in-

stall this steam heating plant or pipe, and the relationship of the Ehret Magnesia Manufacturing Company to you? Explain what work you did and what work they did, and just exactly how the job was done? A. Yes, sir. In the first place, I purchased the pre-sealed pipe units from the Ehret Magnesia Manufacturing Company, and they were furnished to me by the Ehret Magnesia Manufacturing Company delivered at the job, and at that time it was my function to unload the pipe which came in lengths of about 20 feet from the trucks and to place them along the trenches.

I then excavated these trenches in accordance with the plans for the job.

Q. Are those plans the ones shown, the lay-out plan which I have offered in evidence? A. Substantially, yes, sir. This plan in evidence is, of course, a typical plan, and small deviations from it were made in accordance with underground conditions as digging was progressing. But this is substantially the correct plan for the entire lay-out.

Q. Who was that plan prepared by? A. That plan was prepared by the Norfolk Engineering Office of the War Department.

77 After the pipe had been received by me, it was my function to excavate the trenches in which this pipe was to be laid and to prepare the grades at the bottoms of the trenches and lay the pipe into the trench, and to weld up the pipe together.

Q. That is the smaller inside pipe as shown on that section which was brought in here? A. The pipe itself; not the insulation, the waterproofing or the galvanized container on the outside which contains the waterproofing. I welded up the steam pipe together and tested it out.

At that point the Ehret Magnesia Manufacturing Company took over the job, and their function was to seal the joints. Every 20 feet there would be a joint from 12 to 18 inches long where the steam pipe itself was continuous through, but there was no insulation, waterproofing or galvanized sheet metal over the top.

It was then their function to make up those joints at 20 foot intervals and to make the waterproofing and the covering of the pipe continuous throughout.

After they had done that work, it was then my function to backfill the trenches and to cart out the excess dirt.

Q. How was the job handled? How did it progress with reference to whether— A. (interposing) It was
78 handled in substantially that manner. Of course, there were at certain times delays in getting pipe. There were other delays due to weather conditions. Sometimes it rained. This work was carried on during the winter time, and it was not possible to work every day, but we worked every day when it was possible to do so.

Q. Who had charge of making the tests as to when the pipe which had been laid and welded and tested by you should receive the necessary attention to complete the insulation job? A. You mean, to make up the joints in the pipe?

Q. Yes. A. That was entirely the function of the Ehret Magnesia Manufacturing Company. We had nothing to do with that.

Q. Did you make any tests as to when that should be done? A. No.

Q. At no time? A. No.

The Court: That does not answer the question as to who decided when it was to be done. Were representatives of the defendant on the job while the work was being done, or were they notified when it was ready for completion of the waterproofing?

By Mr. Pratt:

Q. I think if you will answer his Honor's question
79 and explain it fully— A. In the method of handling the work, we first laid several hundred feet of the pipe and prepared it for the laborers of the Ehret Magnesia Manufacturing Company, so that when they came on the job they would have enough work ahead to keep them

busy. After that the Ehret Magnesia Manufacturing Company maintained their own mechanics on the job continuously, as nearly as I can recollect, until the job was completed.

Q. And they decided when they would put on this insulation? A. Yes, sir.

By the Court:

Q. Did they get any notice that you were ready for them?

A. I gave them notice when I first asked them to come on the job. After that they were there every day and proceeded with the work behind our men.

By Mr. Pratt:

Q. With reference to the question of delays, your men worked in harmony with the Ehret Magnesia Manufacturing Company? A. Yes, sir.

Q. They were in contact with each other every day? A. Yes, sir.

Q. And the job progressed with both groups working together? A. Yes, sir.

Q. With reference to delays, did it ever occur that you were prepared with the installations which you had made and ready and waiting for them to come along and do their part of the job so that you could backfill?

Mr. Fitzgerald: I object. The question is leading.

The Court: Yes.

Mr. Pratt: I will withdraw it.

The Witness: Yes, sir; we proceeded with our work considerably faster than Ehret did with theirs, to this extent, that whereas we started out, at the time the Ehret Magnesia Manufacturing Company people first came down, with several hundred feet of pipe ready for them to do their work, we rapidly completed more pipe—we completed more pipe more rapidly than they completed their work, so we were continuously getting considerably ahead of them. The pipe was ready for them to close up—oh, I should say that at

one time there was a couple thousand feet of it ready for joints to be made and they were getting a little bit behind with it.

By Mr. Pratt:

Q. And they used their own judgment as to when they would work? A. Yes.

Q. Did they know the progress of your phase of the
81 work each day? A. They were there all the time.

* * * * *

83 Q. Did you or did you not, in the installations which you made, in the laying of this pipe, follow the recommendations of the manufacturer? A. Yes, sir.

Q. Or his agent? A. That is right.

Q. What was the procedure with reference to obtaining such recommendations? A. In the first place, we requested from them whatever information they had to give us prior to the laying out of the lines. Under the specifications pertaining to this job, it was required by the United States Government that we should prepare detailed lay-outs showing a plan under which we were to lay this pipe, and we did prepare those lay-outs and prepared them in accordance with the Ehret Magnesia Manufacturing Company who provided us with the necessary engineering information, but the plans were provided by us.

84 After those plans were prepared, they were submitted to the War Department for approval, and were duly approved. We then proceeded with the installation of the equipment, and, as I say, after the work had proceeded to a certain point where the workmen of the Ehret Magnesia Manufacturing Company were needed on the job, we sent for them. They came—

Mr. Fitzgerald: Just a minute.

The Witness: They were there until—

Mr. Fitzgerald: May I interrupt? You speak of “we.” Whom do you mean by that?

The Witness: When I say "we"—I would have to go over the question in each case to determine.

By Mr. Fitzgerald:

Q. You were not on this job daily yourself? A. I was there every week. I was not there every day of every week, but I was there every week, sometimes for the full week and sometimes for only one or two or three days of that week.

Q. The testimony that you are now narrating is information that you had received from your workmen in reference—— A. (interposing) No, the work did not proceed that fast. It was possible for me to be there two days each week and still see everything to be done. There was nothing down on that job that I did not know about.

Q. Do you know it from your own personal knowledge? A. I know it from my own personal knowledge, certainly. I was the contractor on the job.

By Mr. Pratt:

Q. In installing this pipe several hundred feet ahead, maybe a thousand feet ahead of the Ehret people in their sealing——

* * * * *

Q. Was that done with or without consultation with the agents of the Ehret Magnesia Manufacturing Company? A. As nearly as I can recollect, sir, they asked us to notify them when we had enough work ahead so that they could keep their men busy, and we did so notify them.

Q. How was that notice given? A. If I recollect correctly, it was given by telephone to their district representative in Washington.

Q. What was his name?

Mr. Fitzgerald: I object unless this witness himself knows that of his own personal knowledge. He refers to "we" all the time. I wish you would confine him to his own personal knowledge.

Mr. Pratt: That is what I want to do.

86 The Witness: Where I said "we" in that case, I meant the National Heating Company, and principally myself.

* * * * *

By Mr. Pratt:

Q. Was this job which you had undertaken under this contract eventually completed? A. Yes, sir, it was eventually substantially completed.

Q. About what date? A. About the first of June, 1942, we reached the substantial end of our work.

Q. Was the job accepted by the Government? A. No, sir, it was not accepted by the Government at that time.

Q. Just what happened? Did you offer the job to the Government for its acceptance? A. Yes, sir. We called for the official inspection of the job, and during the course of the final inspection the inspectors acting for the War
87 Department raised certain questions as to the—

Mr. Fitzgerald: Just a minute, please.

Unless the witness can place one of the representatives of the defendant with him at the time of these inspections, and so forth, I must object. I object to the answering of the question in that fashion. He is undertaking now to say that some of the inspectors of the United States Government—and I do not know whether they will be here to testify or not, but this job was done and this material was supplied by the defendant, and the witness is undertaking to testify to inspections from conversations with inspectors of the Government concerning this job, and unless he can show that one of the representatives of the defendant was present—

The Court (to Mr. Pratt) Can you meet his criticism?

Mr. Pratt: I did not intend to ask concerning anything beyond the personal knowledge of Mr. Gothwaite.

Q. By confining your answer to matters merely within your personal knowledge—and don't quote what any one said—state what happened, to your own knowledge. A. I proceeded to a meeting with the inspectors, as I just stated.

Q. Was a representative of the defendant, the Ehret Magnesia Manufacturing Company, present at that meeting? A. No, sir, not to my recollection.

Q. Were you invited to that meeting, or were you
88 ordered to attend it? A. It was my function to attend it. I was supposed to be there. The purpose of the meeting—

Mr. Fitzgerald: I object.

The Witness (continuing) —was for me to be there.

The Court: Overrule the objection. Go ahead.

The Witness: The purpose of the meeting was to reach a determination between the Government and myself as to whether my contract had been completed or not.

By Mr. Pratt:

Q. Do you know the date of that meeting? A. No, sir, I cannot recollect exactly. It was some time during the month of June, 1942.

Q. I show you a letter which purports to be from the War Department and has reference to this contract. Will you state what that letter is, giving the date? A. Yes, sir. This is a letter which was received by the National Heating Company—

Mr. Fitzgerald: Just a minute. I would like to see that first, if you don't mind.

The Witness: Yes, sir.

Mr. Fitzgerald: I must object to this, if your Honor please, unless the witness can show that the defendant had some direct knowledge of that.

The Court: Can you tell what did happen with
89 respect to that?

(To Mr. Fitzgerald) Have you seen this other letter?

Mr. Fitzgerald: Yes, sir. The same objection to that.

Mr. Pratt: I wonder if you observed the signature of the witness on the other side of both letters, in which he accepted the terms and conditions to do everything——

The Court: He wants to know if this was called to the attention of the defendant.

Mr. Pratt: First of all I would like to identify these.

Q. This letter of June 11, was that received by you? A. Yes, sir. This letter was received by me.

Q. What was the subject matter of this conference you attended, the subject discussed?

Mr. Fitzgerald: I object to that, unless the witness can show that the defendant had knowledge of it or was present.

The Court: These letters were not submitted to the Pre-trial Justice?

Mr. Pratt: No, they were not. They were to be identified by engineers in the War Department in a deposition.

By the Court:

Q. Was the fact of the suspension of the work called to their attention or not? Do you know whether that
90 was done or not? A. No, sir.

Q. You mean that they were not notified? A. No, they were not notified of the suspension of this work.

The Court: It seems to me that it is admissible.

Mr. Fitzgerald: I submit that from the witness's own testimony it is not admissible.

The Court: The work was suspended for a period of several months, or part of it.

Q. Had the defendant done any work at this place in June, 1942? A. At this time the work had been substantially completed. Certain defects had been developed, and it was the desire of the War Department to study the conditions which had arisen with a view to deciding what should be done about it.

The Court: Mr. Fitzgerald, it seems to me that it will throw some light not only upon the situation, but who was

responsible, if it was delayed four months and no effort was made to protect these things during that time.

Mr. Fitzgerald: That is the point I am trying to get at.

The Court: I overrule the objection, and you have an exception.

Mr. Fitzgerald: I assume all the exceptions, with-
91 out taking them, will be granted?

The Court: You may move to strike out later, if you want to.

Mr. Fitzgerald: That goes to both letters?

The Court: Yes.

By Mr. Pratt:

Q. Did you receive another letter dated October 16, 1942, also from the War Department? A. Yes, sir.

Mr. Pratt: Justice Adkins has examined these letters.

The Court: Let me look at them again.

Mr. Fitzgerald is familiar with them, I believe?

Mr. Pratt: If I am not mistaken, he has copies of them.

Mr. Fitzgerald: I do not think I have. I may have.

The Court: I will pass them down to him.

Mr. Fitzgerald: I think those are the ones I just looked at.

(Two letters from War Dept. to Plaintiff, one unidentified in this record and the other dated October 16, 1942, received in evidence.)

By Mr. Pratt:

Q. Who was present at those conferences?

Mr. Fitzgerald: What conference do you refer to?

Mr. Pratt: To the conference he testified he attended.

A. There were, of course, several conferences.

92 Q. In June? A. The one to which I was referring in June was attended by myself, my superintendent, Mr. Gibson, the superintendent of the Office of the Area Engineer of the War Department, Mr. Calvin, one of his assistants, Mr. White, and two other assistants of the office

of the War Department whose names I do not now remember.

Q. Do you know if Mr. Ketcham was there? A. It is my recollection that Mr. Ketcham was not present at those particular conferences, although he was present at conferences which arose out of this—

Mr. Fitzgerald: I object. Are you confining yourself to your first meeting in June? Questions as to subsequent meetings will probably follow, but your question now is limited to this one meeting. A. It is my recollection that Mr. Ketcham was not present at this meeting.

By Mr. Pratt:

Q. Do you know whether Mr. Maddy was present? A. No, sir, Mr. Maddy was not present at this meeting. Mr. Robbins was present during part of the meeting, but not during all of it. Mr. Calvin acted for Mr. Robbins.

Mr. Fitzgerald: I wish that he would bring out that these gentlemen have no connection whatever with the defendant.

93 Mr. Pratt: I know that.

Mr. Fitzgerald: I do not want it to be assumed that these men are connected with the defendant. None of these men are connected with the defendant.

The Witness: They were employees of the War Department.

By Mr. Pratt:

Q. As a result of that conference, what happened?

Mr. Fitzgerald: Now, if your Honor please, I want to impose another objection. If counsel expects as a result of this conference to set forth some objection to the work done by the defendant, I must object.

The Court: I do not see how I can find out what the defect was unless he is permitted to tell what criticism the War Department made and what happened afterwards. That may not shed any light on who is responsible for the defect, but I certainly ought to know what took place.

Mr. Pratt: I think that the contents of the conversations or discussions in that conference are relevant, material and admissible in evidence here. I tried to avoid asking the direct question on that point.

The Court: You have not asked what took place, but, as a result of that conference, what occurred.

Mr. Pratt: I anticipated his objections. Now I am asking the question——

Q. What occurred in that conference?

94 Mr. Fitzgerald: I object.

The Court: The question is, what occurred as a result of that conference?

By Mr. Pratt:

Q. What did occur as a result of that conference? A. As a result of that conference it was decided that we should excavate a portion of the underground steam line which had already been completed as to work performed both by myself and by Ehret. The line had been backfilled, covered with dirt and graded, and it was decided to re-excavate and examine it to see what was the matter with it.

Q. Will you indicate to his Honor that portion of the system on the lay-out plan which it was decided to excavate or re-excavate?

Mr. Fitzgerald: Of course, my objection still goes to all of this line of examination, because none of the representatives of the defendant were present.

The Court: Very well.

A. This examination of the underground system proceeded over a period of several weeks. The defects which the Government found or claimed they found in this work were not all found at one time. We found something which they claimed was a defect and corrected it; then we found something else they claimed was a defect and corrected that. So that was the result of a series of conferences over a long period of time.

This (indicating) is the beginning of the line. Here (indicating) is the boiler house. The steam starts here (indicating) and proceeds down two lines, this line here and its branches.

There was water running at that end (indicating) of the steam line, into this pit (indicating).

By Mr. Fitzgerald:

Q. Was that a manhole? A. Yes. A manhole is used in the same connection as a pit.

The Court: That is at a point practically marked 128 on that map?

The Witness: Yes, sir. The boiler house is built in 128, but right here in this area we checked up these lines to find out why the water was running into the manhole. We found that for a distance of 10 feet along either line the water-proofing—the asphalt had left the steam line.

We then asked the Government what we should do with this line to put it in such condition that they would accept it, and they said "If you will replace the asphalt in this line we will accept it." So we did replace the asphalt.

Mr. Fitzgerald: That is No. 11?

The Witness: This is Point 11.

We then proceeded down to a manhole at this
96 point (indicating). The reason that we went to the manholes is that the manholes were the only points at which the pipe was visible. So we examined the line at the manholes for our own convenience.

Mr. Fitzgerald: That is No. 5.

The Witness: At this point (indicating) we were having the same trouble. Water was apparently seeping into the pre-sealed pipe union at a point outside the manhole and was running into the manhole through the pipe, through the outside of the steam pipe but the inside of the sheet metal casing.

We again approached the War Department, or they were present, and asked them what we should do to make that

suitable for their acceptance. They told us again to replace the asphalt at this point (indicating).

The Court: For about what distance?

The Witness: I cannot remember the exact distances, but they ran approximately to 10 feet on either side of the manhole.

We went along these pipes until we found a point at which water was not leaking into the pipe, although we do not know whether it was leaking at other points because we did not excavate at those points.

We went over the entire steam line, and at point No. 18—

97 Mr. Fitzgerald: Is that another manhole?

The Witness: No, sir, there was no manhole at that point. We excavated the pipe at that point.

Mr. Fitzgerald: There was no leakage there?

The Witness: Yes, there was.

Mr. Fitzgerald: What is this (indicating)?

The Witness: An expansion loop.

At Point No. 27 the same thing occurred.

Mr. Fitzgerald: Is that a manhole?

The Witness: There is a manhole there, yes, sir.

Then we came down to this point which is marked No. 14 on the plan, where the difficulty appeared to be worse than at any other point. Water was running at that pre-sealed pipe union into a manhole at that point in considerable quantity. We excavated a portion of the pipe, including an expansion loop which was located near that point for a distance of about 40 lineal feet without coming to a point at which there was any substantial asphalt still remaining in the pipe.

By Mr. Pratt:

Q. Forty lineal feet on each side? A. That includes the length of the pipe in the loop.

At that time these conferences proceeded over a considerable period of time.

By Mr. Fitzgerald:

Q. At which none of the men for the defendant
98 were present, during that particular time, and they
were not present here—is that correct? A. Oh, yes.
At that time, if I remember correctly, it was approximately
the first week in September of 1942. I believe that it was
around Labor Day. This section of pipe appeared to be
in pretty bad shape——

Q. What section? A. The section around 14.

By Mr. Pratt:

Q. You were present when it was excavated? A. Yes, sir.
I thought that the Ehret Magnesia Manufacturing Com-
pany ought to see this and there ought to be a conference
with us and the War Department as to the condition of this
pipe. I did not know how far this was going to go. So I
came back to Washington and I called the district repre-
sentative of the Ehret Magnesia Manufacturing Company
and asked them to meet me down there, which he did.

By Mr. Fitzgerald:

Q. Who was he? A. His name was Mr. Charles Droba.
During the period approximately the first week in Septem-
ber, 1942, this section of line having been partly exca-
vated——

Q. 14? A. At Point 14, we had a conference, Mr. Droba
as the representative of the Ehret Magnesia Manu-
99 facturing Company and various representatives of
the War Department, including Mr. Calvin and Mr.
White and others, and for the National Heating Company
Mr. Gibson and myself, all being present. We asked—both
the representatives of the War Department and of the Na-
tional Heating Company asked Mr. Droba, the representa-
tive of Ehret, what should be done with this section of the
steam line which had evidently deteriorated.

By Mr. Pratt:

Q. You say what could be done? A. What should be done. Should I testify as to what was said at that meeting?

Q. Yes, go ahead and tell us everything that was said and everything that was done when Mr. Droba was there. A. I intend to tell what Mr. Droba told me. Mr. Droba told me then and the representatives of the War Department that the insulation and the waterproofing of that pipe around the expansion loop at Point No. 14 would have to be replaced, inasmuch as it had deteriorated to such an extent that it was no longer useful.

Q. Are there any other points which you can refer to on this exhibit? A. These were substantially all the points. However, I had not completely finished with No. 14.

Q. Go ahead and finish. A. I asked Mr. Droba if he would be willing to undertake to do that work on behalf of the company. He said no. I asked him if he would furnish the material. He said no, he would not. I therefore placed an order with the Ehret Magnesia Manufacturing Company, inasmuch as I was under an obligation to the United States Government to complete this job, for the necessary material to do the work which Mr. Droba had recommended be done.

However, after Mr. Droba had left the premises, the War Department told me that it would not be——

Mr. Fitzgerald: I object to anything that the War Department may have told him out of the presence of Mr. Droba.

Mr. Pratt: And I resist the objection, on the ground that whatever the War Department told this contractor is material to the issues of this case, whether Mr. Droba or anybody else was there.

Mr. Fitzgerald: Not so far as affecting the defendant.

The Court: Overrule the objection.

Mr. Fitzgerald: Allow me an exception.

The Court: Yes.

The Witness: After Mr. Droba had left the premises, the War Department told me that they would not accept this job in so far as repair of the work at Point No. 14 was concerned unless I would continue the excavation of that line around Point 14 to a point where the steam line was still in good condition. I then continued the excavation
101 beyond the point which had been laid bare while Mr. Droba was present.

By Mr. Fitzgerald:

Q. Did you say that Droba was present only at the 14 point? A. No.

Q. But he was not at the other points? A. That is right. I then excavated this steam line, including the line across that boulevard which is the main highway through the post at Langley Field.

Mr. Fitzgerald: Identify that.

The Witness: For a distance of about 180 lineal feet.

By Mr. Pratt:

Q. From Point 14? A. Including Point 14. I excavated that line, substantially from Point 13 to Point 15, before I came to the point beyond which the War Department was willing to accept the line in its then existing condition.

By this time the work had proceeded up to about the first of October, and when this line had been excavated from Point 13 to Point 15 the War Department decided that the condition of the Ehret Magnesia Manufacturing Company pipe in this area——

Mr. Fitzgerald: Same objection.

The Court: Same ruling.

The Witness (continuing) —was so bad that they
102 would not accept the pipe even if new covering and new waterproofing were installed. They thereupon ordered me to abandon the Ehret Magnesia Manufacturing Company pipe between those two points and to make the

new installation between those two points of new steam line in a concrete trench.

By the Court:

Q. And that concrete trench was new? A. Yes, sir, entirely new. The defendant's installation was abandoned between those two points.

By Mr. Pratt:

Q. Was this exhibit, letter dated October 16, 1942, from the War Department accepted by you as such an order?

A. Yes, sir. The War Department ordered me to abandon the Ehret Magnesia Manufacturing Company pipe between these two points, and ordered me to replace that line in a concrete trench, which was all new work between those two points, and this letter dated October 16 was the written order to perform that work, under Change Order 5, Supplement 1.

Mr. Fitzgerald: That is all under the same objection.

The Court: All right.

By Mr. Pratt:

Q. And this change order that you just referred to dated August 16, 1942, also provides a decrease in your contract price by \$4,000 by reason of the failure— A. Yes.

103 Mr. Fitzgerald: I object to the argument of counsel. The letter speaks for itself, and I move that the answer be stricken.

The Court: Well, it does not do any damage if the letter is admissible.

By Mr. Pratt:

Q. Now, Mr. Gothwaite, have you completed your description of the conditions which were found pursuant to conferences held by you between you and the War Department officials wherein there were certain defects contained? A. Substantially, yes, sir.

The Court: Does this include all the defects found?

The Witness: Yes, sir.

By Mr. Pratt:

Q. That includes all the defects which were found? A. Yes, sir.

Q. What did you do to remedy those defects, if anything, beyond what you have already testified to? You stated what you did at certain points. Have you stated everything that you did with reference to remedying the defects? At the first point you mentioned, I think Point 11, you stated that you refilled the pipe with asphalt. A. Yes, sir, at several points we were permitted to replace the waterproofing which had disappeared from the pipe with new waterproofing.

* * * * *

107 By Mr. Fitzgerald:

* * * * *

108 Q. You understood that you were getting goods manufactured in the defendant's plant? A. That is right.

Q. And that is the same as this exhibit here? A. That is right.

The Court: I assume that the defendant does not manufacture the pipe itself, the inside pipe. Did they manufacture any of the other things?

Mr. Fitzgerald: They manufactured the insulation.

109 The Court: They made the magnesium, and the asphalt?

Mr. Fitzgerald: The magnesium and the asphalt.

The Court: And then they bought the pipes?

Mr. Dubois: We buy the asphalt, too.

Mr. Fitzgerald: He can testify later.

Mr. Pratt: I think that he had better reserve his statements.

By Mr. Fitzgerald:

Q. Now, under your contract with the defendant you were supposed, were you not, to purchase this Durant insulation machinery? A. I purchased the Durant pipe from the defendant, but I did not purchase the pipe separately from the insulation of it.

Mr. Pratt: The contract speaks for itself.

Mr. Fitzgerald: I am trying to bring out the details from this gentleman, as to just exactly what the arrangement was.

The Court: Do you differ from what he said in the beginning on that? Why don't you state it in your own way? You can lead him, if you think that there is any difference between what he said and your understanding. Why don't you put it in your own language?

By Mr. Fitzgerald:

Q. After the material was purchased, it was delivered to Washington by the defendant, was it not?

A. To Langley Field, Virginia.

Q. Then when it arrived at Langley Field, you from then on took charge of it until it was laid in the ditch—is that correct? A. Yes, sir.

Q. So that when it was delivered at Langley Field, you and your trucks, or trucks supplied by you or the Army, carried it from the station to Langley Field? A. Well, it was delivered in trucks.

Q. When it was delivered in trucks at Langley Field, was it delivered in lengths or was it delivered—how was it delivered? A. It was delivered in lengths fabricated substantially as you see in the sample, and those lengths were what is known in the trade as random lengths, 20 feet each.

Q. Then there was an opening left at the end of each 20 feet which exposed the magnesia and the asphalt the same as or similarly as that is exposed now? A. Yes, sir; each length on each end of the length was substantially as at present.

Q. What happened to that material after it was taken by you and delivered to Langley Field? A. It was set up in piles along the trenches.

111 Q. Which you had dug up? A. Yes, sir.

Q. The trenches which you had dug up? A. The trenches which I had already prepared in part for the reception of this pipe. As the pipe was received I had it delivered by the trucks in which it was delivered alongside these trenches to a point as nearly as possible at the trench, and had the pipe unloaded from the trucks at this point and laid up in piles at this point.

Q. While that material laid in piles, whose responsibility was it to see to it that it was protected from the elements? A. I assume that it was my responsibility.

Q. Now, there came a time that your men took this material and laid it in a trench? Is that correct? A. That is correct.

Q. Now, while it was in the trench, whose responsibility was it to protect that exposed material lying open in the trench with the ends exposed as indicated at the top of that exhibit?

Mr. Pratt: I want to object.

Mr. Fitzgerald: I think it is quite material.

Mr. Pratt: He is asking for his opinion.

Mr. Fitzgerald: It is not a question of opinion, but a question of fact, definitely a question of fact.

Mr. Pratt: I think the question of responsibility is
112 set out in the correspondence.

The Court: You did not object to the question put to him before.

Mr. Pratt: I know, but I am objecting now because it is being repeated. I did not want to object at all. It calls for an opinion.

Mr. Fitzgerald: I think the witness knows who was responsible for that, and I think he can testify.

Mr. Pratt: He can testify as to who assumed the responsibility.

The Court: Overrule the objection.

Mr. Fitzgerald (to the witness) Do you understand the question?

(To the reporter) I wish you would repeat it.

(After the question had been repeated, as recorded above:)

A. As nearly as I can answer that question, I do not know whose responsibility it would be.

By Mr. Fitzgerald:

Q. Well, was it your responsibility, sir? A. I say I cannot say.

The Court: He is not willing to admit it. Go ahead.

I would like to know what steps were taken to protect it.

Mr. Fitzgerald: That is the very point I am trying
113 to get to.

The Court: He is not willing to admit that it was his responsibility.

By Mr. Fitzgerald:

Q. Was it the Ehret Magnesia Manufacturing Company's responsibility to see to it that they were protected from the elements before they were sealed? A. I cannot say it was, no sir. I do not know whose responsibility it was.

Q.-Reading from a letter counsel introduced in evidence, the contract of November 3—

The Court: Perhaps this is a good place to recess. I will suspend.

* * * * *

Q. Now, Mr. Gothwaite, the letter from the defendant to the National Heating Company, yourself,
114 dated November 3, 1941, and subject to the second letter of December 23, 1941, which are exhibits in evidence, constitute the contract between you and the defendant, doesn't it? A. That is my understanding, yes, sir.

Q. Now I show you the letter of November 3, 1941, and ask if you will read that, along there (indicating)? A. Out loud?

Q. Yes, sir. A. "After the insulated pipe has been installed by the mechanical contractor and tested, we will insulate the field joints, that is, where two lengths of pipe are joined together, said joints not to exceed 18 inches in length;

"Install the waterproofing in foundation walls where the conduit enters buildings or manholes;"

Q. Do you understand that language? A. Yes, sir, I think I do.

Q. Doesn't that indicate that your responsibility as a mechanical contractor—you were the mechanical contractor? A. I was a general contractor.

Q. That is the same as the mechanical contractor? A. Yes.

Q. Isn't it your responsibility that, after the Durant is placed in the trench by you, you were responsible for the protection of any exposed magnesia or any exposed joints?

115 Mr. Pratt: I object to that question.

The Court: Don't you think you have gone far enough in that?

Mr. Fitzgerald: What I want to get at is an expression from him as to whether he was responsible or not. This is cross examination.

Mr. Pratt: I will withdraw the objection.

A. My answer to that question is this: I find it very difficult, between the Ehret Magnesia Manufacturing Company and myself, to divide questions of responsibility up into little pieces here and there. We installed this pipe jointly. It was my understanding when the Ehret Magnesia Manufacturing Company undertook to do the work that they would be responsible for the waterproofing. It is so stated in the letter. Not part of the covering or the waterproofing, but all of it. Nothing was ever said to me to the contrary. Nothing was ever said to me, either in the letter or elsewhere, that this pipe could not stand out in the water and be rained on. Nobody ever told me that. Nobody ever told

me that it could not get wet. You are responsible for the covering and the waterproofing, in my view.

Q. While it was exposed in the trench? A. It makes no difference where or when. You did all the covering; you did all the waterproofing with your own men, and they know it. You did it when you pleased and as you pleased.

116 I made no objection to it at any time.

Q. Would you mind reading this (indicating), then? A. "The insulated pipe will be shipped to Langley Field, Virginia, when and as directed, in accordance with the progress of the job. Freight will be paid by us on all insulated pipe furnished to Langley Field, Va., deliveries to be made via truck direct to the job site."

Q. Will you read below here, as to what they were not responsible for? A. Why don't you let me read the whole thing from beginning to end?

Q. Surely; you can read the whole thing. Suppose you read just what you want. A. Here is the story:

"The insulated pipe will be shipped to Langley Field, Virginia, when and as directed, in accordance with the progress of the job. Freight will be paid by us on all insulated pipe furnished to Langley Field, Va., deliveries to be made via truck direct to the job site."

Q. What is your understanding there? A. That you will furnish the pipe at a certain price delivered to Langley Field, as modified by the following:

"The above price will also include the furnishing of the Durant system for expansion loops, as per sheet DP-307 of the attached brochure. We will furnish for the ex-
117 pansion bends; all the pipe, welding ells, oversized insulated pipe for the legs of the bends, furnishing and installing inner casing, insulation, asphalt and outer casing over the long radius tube turns after they have been welded into position."

What do you understand by that? A. I understand that you are to furnish all the material to do all the work of insulating and waterproofing the material that has been laid in place by me.

Q. Now, down to "After." A. "After the insulated pipe has been installed by the mechanical contractor and tested, we will insulate the field joints, that is, where two lengths of pipe are joined together, said joints not to exceed 18 inches in length."

Q. Is it not a fact that after the insulated pipe has been installed by you in a trench and then tested by you—is that right? A. Yes.

Q. (resumed) The Ehret Magnesia Manufacturing Company, the defendant, will insulate all the field joints? A. Insulate and waterproof. .

Q. Is it your understanding that all responsibility for the exposure of this material to the elements before you had installed it and tested it is the responsibility of the defendant? A. I do not see that the responsibility
118 lies with either one. How can you install pipe without exposing it to the elements?

Q. It is somebody else's responsibility? A. If you wish to state that it is my responsibility, I deny it.

Q. I am not stating anything. I am trying to get something from you. A. All right. I deny it.

Q. I have not stated anything. A. I said if you wish to state it.

Q. Is it your responsibility? A. I deny it.

Q. Is it the responsibility of the defendant? A. I have no knowledge of that at all. The matter was never brought up between us.

By the Court:

Q. May I ask at that point at what stage the pipe was tested? Did you wait until it was all laid before testing it, or did you test a couple hundred feet at the time? A. We tested a couple hundred feet at the time. The purpose of testing it was to determine whether or not the welded joints of the steam pipe were secure.

Q. Until that had been determined, no work would be done to waterproof those? A. That is right.

119 Q. But after that had been determined, then it was ready for the waterproofing? A. Yes.

By Mr. Fitzgerald:

Q. After this Durant was installed in the ground and after you made the test, didn't the defendant waterproof it? A. Yes, sir.

Q. Now, after the waterproofing, did that pass your inspection? A. I had nothing to do with inspection. The Government inspected it.

Q. You were satisfied, weren't you? A. I had no reason to be either satisfied or not. I did not claim either satisfaction or dissatisfaction.

By the Court:

Q. You left the question of inspection to the Government? A. Yes, sir; that was their business.

By Mr. Fitzgerald:

Q. What do you mean by "test"? A. "Test" as stated in here?

Q. Yes, sir. A. It was tested with hydrostatic pressure, with water pressure, inside the steam pipe and return pipe in order to determine whether the welding
120 had been done successfully.

By the Court:

Q. You do not mean to test with live steam? A. No, sir, with water pressure.

Q. That is considered to be an adequate test? A. According to the Government regulations.

By Mr. Fitzgerald:

Q. After that was tested, portions of the work were inspected by the Government? A. All of it was inspected by the Government.

Q. And you found no defect yourself at that time? A. No, there were no apparent defects at that time.

Q. Would you mind reading further? A. "Install the waterproofing in foundation walls where the conduit enters buildings or manholes"—

Q. What do you understand by that? A. This refers to waterproofing. It was my understanding that you furnished the waterproofing wherever waterproofing was required.

Q. What does it say there? A. It says "Install the waterproofing in foundation walls where the conduit enters buildings or manholes."

Q. Would you explain that to us? A. As nearly as
121 possible, yes, sir. The pipe came in approximately
20-foot lengths. It came from the factory already covered and waterproofed, with the exception of small pieces at the ends which were left open to enable the contractor to join all parts together.

Q. Meaning you? A. Yes. I joined them together. Then the continuing responsibility of the Ehret Magnesia Manufacturing Company was to continue this covering and this waterproofing over the joints thus made.

Q. Did they do that? A. Yes, in their own way, with their own men.

Q. That was done under your observation, or the observation of your men? A. It was not done under my personal observation, but under my supervision.

Q. Under the supervision of your mechanics? A. No, sir, they did it themselves.

Q. You had somebody watching it? A. Yes, but I had nothing to do with it.

Q. You mean to tell me that they were not interested in the way they sealed this thing? A. I was, naturally, but they were the manufacturers of it, the guarantors of it, and their work was done in their own manner.

Q. What I am trying to get at is, after they poured
122 in the insulation material, meaning this (indicating on sample) and the asphalt—when that was done, was that done to the satisfaction of yourselves? A. As far

as I know, although I claimed no responsibility for their accepting or rejecting at that point.

Q. That was at the various joints where the 20-foot lengths joined together that you installed this material?

A. Yes.

Q. When it came up to the manhole, just describe to us what the obligation of the defendant was up to the manhole. A. The manhole was composed of concrete walls about 6 inches thick, and this whole material, the pipe, the insulation, the waterproofing and the sheet metal jacket ran through the concrete wall of each manhole. When it got to the inside wall, certain fittings were to be installed there by us, which was no part of the work of the Ehret Magnesia Manufacturing Company.

Q. In other words, the interior of the manholes was the responsibility of yourself? A. Precisely.

Q. It was when they came into the manholes and installed the waterproofing in the foundation walls where the conduit enters buildings and manholes? A. That is right.

Q. We have now entered the manhole, haven't we?
123 A. Yes.

Q. Where does the Durant obligation begin and end? A. So far as the manholes are concerned?

Q. Yes. A. According to the statement there, on the inside wall of each building and each manhole.

Q. Are they required to insulate on the interior? A. They were never asked to do so.

Q. Were they required to do so? A. No, sir, and never requested by me to do so.

Mr. Pratt: I would like to interrupt for the purpose of interposing an objection to an argumentative process of trying to get the witness to construe the contract.

The Court: Not knowing what they did, as a practical matter a statement as to what was done is proper.

I gather that neither one of you contends that it was necessary to insulate the short amount of pipe that went through the manhole?

The Witness: Yes, sir; that was done by me.

May I make myself clear to the Court?

Mr. Fitzgerald: I have no objection to your making yourself clear.

The Witness: The point which I want to make is this, that the Ehret Magnesia Manufacturing Company was responsible for the waterproofing of all this pipe up to
124 the inside walls of the manholes, and for the maintenance of that waterproofing in place. There is no good in putting the waterproofing in a pipe unless it stays there.

By the Court:

Q. You waterproofed it inside? A. No, sir, that was not required.

Q. Did you insulate it inside? A. Yes.

Q. How? A. With similar material to this (indicating), but without any waterproofing.

Q. You mean you had the magnesia and the asphalt?
A. I had the magnesia, but the asphalt was not placed over the portion of pipe within the manhole.

Q. You mean the magnesia is not a covering? A. It is the covering.

Q. Was anything put around it? A. Yes, sir, waterproof paper.

Q. As a matter of practice, who looked after the joint or connection between the two? In actual practice, which one undertook to see that at a point like that it was protected from moisture? A. We undertook to cover all the pipe in the manholes from the point where their magnesia ended and to make a good joint at that point with their magnesia.

Q. There was an inch of asphalt. Who protected
125 that asphalt? A. I do not know that. I did not. I had no knowledge—

Q. Let me see what we are talking about. From what I understand, when this pipe came to the inside of the manhole—here (indicating) would be the pipe running through the manhole. There is nothing on that part of it. Here

would be the magnesia and here the asphalt (indicating). You took up at that point and you put the same amount of magnesia around and you wrapped that in waterproof cloth? A. Yes.

Q. Who undertook to see that this asphalt was kept from pouring out? A. Nobody undertook that.

Q. It was not done at all. You mean to say that when you wrapped it, you put another piece up like that (indicating)? A. Yes, sir.

Q. Who undertook to see that moisture did not get into these points? A. When we wrapped the pipe we came up here (indicating) and brought it around here, but we did not attempt to contain the asphalt beyond wrapping waterproof paper around the outside of the joint.

126 Q. Let me ask you, did that container project into the manhole, or stop flush with the wall? A. In most cases it projected through.

Q. So you had something to work on? A. Yes, sir.

Q. You did not require your subcontractor to do anything to keep that asphalt in place? Whatever was done was done by you? A. We had no knowledge that the asphalt would run out.

Mr. Fitzgerald: That is not the question.

The Witness: I think my answer is responsive.

The Court: Not quite.

Q. As I understand it, you took the job as they left it there and then carried on, and you put on what you thought was sufficient material to keep any water from getting from the manhole into the pipe? A. Yes, sir. The work I did in the manholes was in accordance with the War Department specifications.

The Court: I do not know whether any of you contend that the asphalt poured out into the manhole because of the failure to block it off there.

Mr. Fitzgerald: That is the only way it could possibly get in.

The Witness: I am sorry! In one section of the pipe where the asphalt had substantially escaped from

127 over 180 lineal feet of this material, it could not possibly have gotten into that manhole, because we did not take enough asphalt out of the manhole to replace the asphalt which would have come from 180 lineal feet of pipe.

By the Court: .

Q. Where did it go? A. This section does not show—here (indicating) it is. When this material is made—perhaps I had better let them explain how it is made.

Q. Go ahead. A. When this material is made, the pipe is laid down and then covered, of course, with sections in here (indicating).

Mr. Dubois: Which is top and which is bottom?

The Witness: This (indicating) is top.

Mr. Dubois: Will you say—

Mr. Fitzgerald: Just a minute.

The Witness: Then the sheet metal is placed around, leaving a one-inch air space around the sheet metal acting principally as an outside form for the pouring of asphalt. Then the asphalt is poured inside. We found asphalt, when we dug up this trench, all along the entire length of the trench. This material had pressed up until asphalt was standing out that far (indicating).

Mr. Dubois: How much dirt?

128 Mr. Pratt: You keep quiet.

Mr. Dubois: I am just trying to get it.

The Witness: This asphalt had pushed up in almost every one of these joints, which occurred about every 24 inches along the pipe; it had pushed up 2 inches high and in many cases broken off.

By the Court:

Q. This (indicating) is supposed to be a casing that keeps the asphalt in, you say, at the joints of that casing?

A. Not at the joints. At these points (indicating). These are pouring points where the asphalt is introduced.

After the asphalt is in there, isn't there any effort made to seal that? A. No. They leave it as it is.

Q. You say the asphalt had crowded out of that point?
A. It had to my knowledge.

Q. How much did you see? A. Every section that we excavated.

Q. Tell me again what happened to the points where you showed— A. The asphalt in front of these points where they had originally been poured, namely every 24 inches, had pushed out for varying lengths. In some cases it had knocked off, leaving little holes, and there were all along the trench—at these points (indicating) the asphalt
129 lay over in the dirt, tending to show that that was the cause of the failure of the pipe, because I do not know—all I know is that the pipe was wet all the way along and for that reason the Government refused to accept it.

By Mr. Fitzgerald:

Q. Each one of these openings here where you see this black mark is right at the joints? A. No, sir. There is one of these every 24 inches all along the pipe.

Q. When they were installed, there was a small opening—is that right?—in this little box (indicating)? A. It came to me that way.

By the Court:

Q. That installation was at the factory, I suppose? A. It came to me in that fashion.

By Mr. Fitzgerald:

Q. When they had the joints welded together where you were supposed to weld it every 20 feet, didn't they have a cup or cylinder that they put around that to pour asphalt? A. They made it the same way they did at the factory. They first covered it with magnesia, and then wrapped a piece of sheet metal around it. Then they pushed asphalt into this joint (indicating).

Q. You knew they did that in every one of them?
130 A. Sure.

Q. When this got to the manhole and inside the manhole, you said you put paper covering over the magnesia. A. Yes.

Q. What did you do that for? A. I thought it was required by the specifications.

Q. Isn't there a reason for that? A. I presume so, but I do not attempt to go beyond my work as required. I was not the engineer on this job.

Q. Isn't it a fact that when you put this paper covering over that, it was for the purpose of keeping out moisture? A. I presume so.

Q. Then if water had gotten into the manhole by reason of rain or some other foreign substance, the water would rise and go above the pipe which was in the manhole? A. It might possibly do so.

Q. And that would be submerged into that water; and wouldn't that water, by reason of the poor insulation paper, seep through there and get into the magnesia? A. In answer to that hypothetical question, it might be possible, but in point of fact it did not do it. The water never got into the manhole and up above the steam lines, to my knowledge.

Q. I think that it all on that point.

Now, the balance of that I would like for you to read, in order to have it complete. A. I do not like to leave
131 out a sentence.

"Insulate all fittings and expansion bends, when and where necessary according to design.

"Durant insulated pipe will not be run further than the inside of manhole walls in manholes."

Q. That is Durant insulated pipe? A. Yes. Do you wish me to go on?

Q. Yes. A. "The work and cost which will have to be absorbed by the mechanical contractor is as follows:"

Q. Are you the mechanical contractor, and this is the work that you are to do? A. That is right.

Excavation; distributing of insulated pipe from point of truck delivery at job site to trenches; installing pipe in trenches; cost of welding ells and/or fittings which are insulated in the field, with the exception of those furnished for the expansion bends; lining up of pipe in trenches to grade requirements; cost of clamps, channels, and concrete for anchors; all welding and mechanical work; back filling; cost of installing sleeves in foundations where conduit system enters buildings."

Q. In that connection—the rest of it does not apply—you understood fully what you were required to do? A.

Certainly, yes, sir.

132 Q. Now, Mr. Gothwaite, do you know Mr. Tommy Hoyle? A. Yes, sir.

Q. What was his position? A. He was the mechanical representative of the Ehret Magnesia Manufacturing Company, who actually did the work in the field.

Q. He was the general superintendent of the work to be done by Durant—by the defendant? A. All right, sir.

Q. Now, you say that you frequented the job every week and spent two or three days? A. One to three days.

Q. In each instance, would you see Mr. Hoyle there? A. I cannot think of any week when I did not see him after he had gone on the job with the exception of two or three weeks when he was withdrawn to go on another job with which I had no connection.

Q. Did he come back to your job after he went on this other job? A. Yes.

Q. And then continued? A. Yes, sir.

Q. Did he continue there up until the time that the defendant was required to do its work at this job? A. He continued on the job until his work was completed
133 with the exception of a small amount which he left for my men under an agreement with the Ehret Magnesia Manufacturing Company.

Q. So with the exception of the few days he was away or the week or two he was away on another job, he was there to your knowledge most of the time? A. He was.

Q. Did there come a time that you and he had a conversation with reference to getting him, Hoyle, to seal certain of this Durant when it was wet? A. Yes, sir.

Q. But he refused to do it? A. He certainly did.

Q. What was the cause of that wet condition? A. Numerous causes. The material got wet first because it was lying in the trench and the ground water in that trench continually rose, since the ground at Langley Field is very slightly higher than high tide.

Q. And it was because of this wet condition that existed that Hoyle refused to seal it? A. Yes.

Q. You wanted him to seal it? A. I wanted him to seal it just as quickly as he could.

Q. Whether it was wet or not? A. I wanted him to do it in the way he decided, and he did it in the way he
134 decided.

Q. No—answer the question. A. I wanted him to do that work as quickly as it could be done.

Q. You wanted that work finished whether the magnesia was wet or not, didn't you? A. No, I did not say that. That was your statement, not mine.

Q. Didn't you just say that the condition was wet? A. I said the magnesia was wet, and I said further that I wanted him to seal up those joints as quickly as he could.

Q. While they were wet? A. No, not while they were wet.

Q. Didn't you ask him to seal those wet places up before they were dry, and he refused to do it? A. He refused to seal the joints until he was satisfied that that material was dry.

Q. You tried to get him off that job, didn't you? A. No, I never did.

Q. Did anybody for you try to get him off the job? A. No, sir. I have the greatest respect for him.

Q. Now, Mr. Gothwaite, coming back to this point (indicating), we have here at the boiler house No. 128, and right adjoining that is a manhole. Then we go up to Point

No. 13 and we find another manhole there. A. No, 135 sir; that is an anchor point.

Q. What is that. A. A point at which a section of steel or other material is placed across the pipe in such manner as to prevent it from expanding at that point. There are anchors all along these pipes, and the purpose is to throw the expansion into the expansion loop so that each section of pipe having an expansion loop will expand according to the calculations therefor.

Q. And you have a loop and a manhole at point No. 14? A. Yes, sir.

Q. Where is your next manhole? A. No further manhole until you get to this point (indicating).

Q. What point is that? A. Point 27.

Q. Where is the next manhole? A. That is the only manhole in that line.

Q. Where is the next manhole? A. There is one here, No. 5. One at No. 11.

By Mr. Pratt:

Q. No. 11 is at the boiler house? A. Yes. There is one at Point 14. There is one at Point No. 27, and I don't remember whether there is one at Point No. 18 or not.

136 Q. Is it not a fact that there are five manholes, certainly four there (indicating)? I am not sure as to the five? A. Yes, sir.

Q. Is it not a fact that Mr. Hoyle, the superintendent of that job, had connected all of these points here (indicating) when there were no manholes there, but the manholes were constructed by you after he left, or by your superintendent or your men? A. I certainly cannot recollect that, sir.

Q. Do you deny that as a fact? A. I can say that I certainly have no recollection of the job having been done in that manner.

Q. What did the defendant fail to do on this job which it was obligated to do?

Mr. Pratt: That calls for a legal conclusion of the witness. I object to it.

The Court: Well, I think that I will let him answer it, if he can.

A. In my opinion, as far as I am concerned—

By Mr. Fitzgerald:

Q. I mean a statement of fact, not of opinion—what factual thing they did not do. A. They failed to install the waterproofing in the pipe in such manner that it would remain in place during service.

Q. Now, when you say “pits,” you mean the man-
137 holes? A. When I say “pit” I mean manhole.

Q. You did not reserve any work to be done inside the manholes or pits by the defendant, did you? A. There was no work done in the manholes by the defendant that I know of.

Q. The Ehret Magnesia Manufacturing Company had nothing to do with the construction of the manholes or the pits, did they, or anything to do with the interior of the pits or manholes? A. No, sir.

Q. That was all your job? A. Not that I know of, excepting that they were, in my opinion—

Q. (interposing) No, I want— A. (interposing) All right! They had this to do with the construction of the manholes: They had to provide sufficient means that their waterproofing would not deteriorate in the pipe as it entered through the walls of the manhole.

Q. But had nothing to do with the interior or the construction of the manholes? A. Not with the construction, no.

Q. So far as you know, when the material was delivered to you at the job and before it was installed in the trench, it was in first class condition, wasn't it? A. As far as I
138 know, it was in the same condition when it was delivered to me as it was when it was installed in the trench.

Q. You have not answered my question. When the material was delivered to you at Langley Field, it was in first

class condition, wasn't it? A. I must repeat my previous answer. I did not examine the material, nor do I claim to be an expert in the manufacture of this pipe. I took it as it was delivered and installed it in the trench as it was delivered. If it was well manufactured at the time I received it, it was well manufactured at the time I put it in the trench. I did not change it in any form.

Q. When you tested it at the joints so that the men could pour the asphalt into these joints, you found the material in first class shape? A. As far as I know, I had no complaint with it.

Q. Now, didn't the inspectors for the Government inspect the work in the field joints and find it to be satisfactory before this episode, or after the dirt was filled in? A. They inspected the field joints every day, as the field joints were made. They made to me no complaint as to unsatisfactory condition in the field joints.

Q. And they made no complaint, as far as you know, to the defendant? A. At the time the field joints were
139 made.

Q. Then after the field joints were inspected, they ordered you to backfill it, put the dirt in? A. Yes, sir.

Q. And to enclose the pipe with dirt. In other words, the trench was closed? A. Yes, sir.

Q. Now, you had your first conference in June with the Government authorities, or inspectors. Where was that conference? A. On the site of the job.

Q. In June when that inspection was made, this work had been substantially completed by the defendant, had it not? A. Yes, sir.

Q. How long prior to that did the defendant complete its work? A. I cannot remember the time at which Mr. Hoyle and the other representatives of the Ehret Magnesia Manufacturing Company people left the job, but I think it was toward the last week in May.

Q. So then it was in June that you had this meeting? A. Yes, sir.

Q. Now, you did not get in touch with the defendant or any of its agents until way in September? A. That is right.

140 Q. And that was three months, almost a three-months lapse or hiatus between this conference with the Government authorities and when you got in touch with Droba? A. That is right.

Q. And you notified Mr. Droba about that defect, about that condition that was found defective by the Government? A. Yes.

Q. And Mr. Droba came down and inspected the place, didn't he? A. Yes, sir.

Q. And you wanted him to replace this defective condition, did you not? A. Yes, sir.

Q. He refused to do it? A. That is right.

Q. Why did he tell you he refused to do it? What did he say? A. As far as I can remember, and I believe that I am correct, he stated that in his opinion the Ehret Magnesia Manufacturing Company would not be responsible for the condition which existed, but that if I wished to take the matter further I should get in touch with the factory.

Q. Did you get in touch with the factory? A. Expecting to the point of asking for this material to be shipped, I did not.

141 Q. Droba told you the reason why the Ehret Magnesia Manufacturing people would not have anything to do with it, that it was not their fault, that water had seeped in through the manholes which you were responsible for? Isn't that correct? A. No, sir.

Q. He did not say that at all? A. To my knowledge, he said nothing of the sort.

Q. What did he say? A. He said that the condition resulted from the insulation getting wet, as nearly as I can remember. It is a little difficult for me to remember what he said. He is here to testify.

Q. He was a very important man, wasn't he? A. Yes, but it is difficult to remember what people said two years ago.

Q. He told you, as a matter of fact, that you attempted to claim that the Durant people were responsible? A. I guess, so, yes, sir, and he disclaimed responsibility for the company.

Q. What reason did he give you for disclaiming responsibility? A. That I cannot testify to exactly, because I do not remember.

142 Q. He did give you some reasons, didn't he? A. I do not remember that he did.

Q. You don't deny that he did? A. I don't either deny or affirm it. I don't remember.

* * * * *

152 By Mr. Fitzgerald:

Q. Mr. Gothwaite, do you know how long a time there was between the time the pipe was laid in the trench until it was welded and tested by you? A. No, sir, I could not answer that with any degree of exactness, because it varied considerably at different lines of trench.

Q. Could you say whether it was a week or two weeks? A. I could not say at all, but it was certainly my impression that it was not two weeks. We laid the pipe in the trench practically as we welded it. The pipe was not laid in the trench until it was ready to weld, and it was a matter of hours, not days or weeks.

Q. But there was as a matter of fact days sometimes between that time? A. Not before it was welded. We laid it on wooden bars at the top of the trench, then welded it at the time, and as we went along we let it down into the ground.

Q. Who was supposed to notify the defendant when the pipes were ready for insulation? A. We notified the defendant when we were ready for them to put their men on the job.

Q. Whom do you mean by "we"? A. The National Heating Company.

153 Q. Do you mean yourself, or your mechanics? A. Oh, no.

Q. Whom do you mean? A. In this particular case—of course, generally it is hard to distinguish between the National Heating Company and the acts of its employes, but in this particular case I did it.

Q. You notified the Ehret people when the welding and testing was ready for insulation? Is that correct? A. At first, yes, the first day we were ready for them.

Q. As each line was completed, you notified them? A. No, I did not consider that it was necessary for me to do that. When I told them to put their man on the job, I then considered that he was on the job and after that he was to take care of the work himself.

Q. How was he to know if the pipe had been welded and tested unless you told him? A. He was told all that every day. He was kept in continual touch with it.

Q. When he was notified, he installed the insulation, didn't he? A. Yes, I presume so.

Q. Do you know what particular man of your concern, of your company, would notify him? A. The different men, I presume. Mr. Hoyle was in contact with us all day, every day.

Q. Would you notify Hoyle, or would Gibson do it? A. Sometimes Mr. Gibson would do it; sometimes the inspector on the job notified him.

Q. Gibson was your general superintendent? A. Yes.

Q. And he was down there all the time on this job? A. Yes, sir.

Q. Did he notify Hoyle as to when Hoyle was supposed to install the insulation? A. I presume so, although I do not know that he did.

Q. When he was notified by Gibson or anybody else and found that the magnesia was correct and O. K., he would then pour in the insulation? A. My understanding of it was that he should do it in his own good time.

Mr. Fitzgerald: I think that is all.

Redirect Examination

160 By Mr. Pratt:

Q. Mr. Gothwaite, there has been a questioning of you concerning whose responsibility it was to care for the pipe after it was delivered and prior to the time it was sealed and the backfilling was done. I would like to ask you this question: Was a recommendation ever made to you by the Ehret Magnesia Manufacturing Company or any of its agents that the pipe had to be covered and kept dry?

Mr. Fitzgerald: I object to that question.

The Court: He has already said that.

Mr. Pratt: He said nobody made any suggestion to him that that was necessary.

Q. Do you know how the pipe was shipped? A. It was shipped by truck.

Q. From where? A. I believe from Valley Forge, Pa.

Q. Do you know whether the trucks were open trucks or closed trucks? A. In some cases they were open trucks; that is, they were stake body trailer trucks.

Q. The pipe was not covered when it was shipped? A. No, sir.

Mr. Fitzgerald: Just one second.

I submit that the attempt made by counsel is without merit, because the witness on my examination said
161 that when the material was delivered at Langley Field it was in A-1 condition, so that counsel attempts to show that it was wet en route—

172 Q. You spoke of a Mr. O'Neil. Did he do any work in the pits? A. Yes, sir, he did work in the pits for me.

Q. He was your employee? A. He was my subcontractor.

Q. What was his particular job? A. He was the covering subcontractor. He covered the boilers that we installed with magnesia, covering the pipes and other places he ap-

plied covering where it was required by the specifications.

Q. By the pits, we both understand them to be manholes?

A. Yes.

Q. Can you tell me why it is you gave that contract for the pit work to the man who worked as your subcontractor, O'Neil, and you did not give that work to the defendant when you know that the defendant supplied that material?

A. You are wrong. The defendant did not supply any of that material that went into the pits.

Q. He supplied the material that went into the
173 Durant system, didn't he? A. Yes, but you have insisted all the way through that the material in the pits was not supplied by you, and it was not.

Q. What did O'Neil do in the pit? A. He covered the steam mains we installed in the pit. Your system ended at the inside wall of the pit, but there had to be a connection through.

Q. Did Mr. O'Neil insulate or cover the interior of the wall of the manholes where the Durant came through? A. You mean if he applied the magnesia covering to the concrete wall of the pit? No, sir.

Q. Who did that? A. Nobody did it.

Q. Durant comes into the pit, doesn't it? A. Yes, sir, it goes through the wall of the pit.

Q. Then it comes flush with the interior of the wall of the pit? A. Not necessarily flush. It goes through the wall of the pit and ends at a point on the inside.

Q. Why didn't you get the defendant to insulate the interior of the wall of the pit? A. There is no reason why I should. It was none of their work to do that. I do not claim it was their work to do that.

Q. You expected, if it fell down, to hold them re-
174 sponsible? A. I do not hold them responsible for that part at all, but only for the work that they did.

Q. If any water seeped through in the manhole into that magnesia, would you hold them responsible for it? A. I would hold them responsible only to this extent: They rep-

resented that Durant system to be waterproof; it is marked waterproof, not only with respect to the circumference of the pipe but to the end of the pipe also. Whether the pipe ends in a blank wall, or pit, or manhole or building, wherever it ends, they ought to do such work as is necessary to retain in their equipment all the waterproofing which they originally installed in it, and if they failed to do so it is their obligation and nobody else's.

Q. Let me ask you this: When the Durant entered the hull of the pit and became in the interior of the pit or manhole, the pipe, the magnesia and the asphalt were exposed, were they not? A. Yes.

Q. Why is it you did not require or bid the job to require the defendant to properly insulate that material for fear the water would rise and go into the magnesia? A. The defendant in their original bid undertook to do that in writing, and I accepted their bid.

Q. Can you show us where in the bid they under-
175 took to do that? A. Yes, sir, if you will give me the papers.

Q. Along that line, let me ask you this— A. I have not answered that question yet, sir.

Q. I will come back to that.

Mr. Pratt: Let him answer the question. You have asked for it.

The Witness: In answer to your question, sir, the defendant among other things bid to do the following work: Install the waterproofing in the foundation walls where the conduit enters buildings and manholes. It is my understanding that the defendant will waterproof his installation up to the point where it ends in the building or in the manhole and take such necessary steps as may be required to prevent such waterproofing from later escaping from his installation.

Q. On that point, when the Durant entered the manhole and it came in the interior of the manhole, it was exposed, was it not, like that is exposed there (indicating)? A. Yes, sir.

Q. Then who covered the interior of that? A. Nobody did.

Q. Was it left exposed? A. It was left exposed, and it should not have been left exposed.

Q. Didn't I understand you to say that you covered it on the interior with waterproof paper? A.

176 Oh, yes, later on our men did that. I understood you to ask me how you people left it.

Q. We were only supposed to come up to the interior of the manhole, weren't we? A. To do whatever is necessary to keep the rest of the material from escaping from the pipe.

Q. That is, from the outside? A. Whether from the outside or inside or any side.

By the Court:

Q. Tell me what they could have done on the inside? A. I do not know, sir, excepting that they could have sealed up the ends.

Q. How would they have done that? A. I do not know. I had no information from them or knowledge that that asphalt was likely to escape into the manholes. As a matter of fact, every point of the questioning seems to indicate that all this failure has occurred through manholes, whereas that is not the true case of the matter at all. But I am answering questions which they bring me as they bring them to me, to show what did happen in the manholes. That is not the only point of failure in the line at all, but it did fail badly there and to the extent it failed it is my claim that they should have stopped it. They knew what their equipment was, and I did not.

177 By Mr. Fitzgerald:

Q. If the manhole became filled with water, or if water had risen in the manhole to such an extent that it covered the Durant, or the pipe submerged, so to speak, and water had gotten into the pipe and to the magnesite through the manhole, wouldn't that over a period of time spread through

the interior of the Durant and cause the magnesia to deteriorate, and the steam, not having proper insulation, would cause the melting of the asphalt and the asphalt would run? Isn't that possible? A. To your hypothetical question I will answer as follows: If the manhole did fill with water, of which I have no knowledge, and I don't believe that they did fill with water at any time, and if that water then entered the Durant system, I should then say that the waterproofing of the system, Durant system, by the defendant was only partial.

Q. Only partial. What do you mean? A. In other words, that the waterproofing done by them was defective, because it was their business to waterproof the steam lines in such manner that water would not enter.

Q. Were they supposed to have waterproofing in the interior of the manhole? A. In my opinion, yes.

Mr. Fitzgerald: That is all.

The Witness: There is no advantage in waterproofing a steam line on the top and not on the bottom, or on one end and not the other. If they undertake to waterproof, they undertake to waterproof; that is all.

Mr. Pratt: That is all there is to it. That is the case.

Mr. Fitzgerald: Let me ask one question.

Q. Mr. Gibson that you referred to was your general superintendent, was he not? A. My superintendent, yes, sir.

Mr. Pratt: I think I have no more questions, Mr. Gothwaite.

(Following part of the testimony of another witness, Mr. Gothwaite again took the stand and was interrogated.

By the Court:

Q. Mr. Gothwaite, take the manhole at Point 11, Boiler House. How deep is that manhole? How square and how deep? A. That manhole—

Q. About what were the dimensions, roughly? A. The dimensions were approximately, in the plan, 4 feet by 6 feet.

Q. How deep? A. Approximately. 3 feet deep.

Q. How near the bottom did the steam pipes enter? A. The steam pipes entered the bottom, I should say, approximately 12 inches to 18 inches from the bottom.

Q. Was the bottom concrete, too? A. Yes, sir.

Q. Was there any drain in any of them? A. Yes, sir.

Q. What was the reason for that manhole (indicating) when the complete work was done? A. When we came out of the boiler house—the pipe came out of the boiler house, building 128, at a point about 10 feet above the ground. This (indicating) was a 5-inch steam line. A 3½ inch return line came out at the boiler house at a point 10 feet above the ground and was dropped down into the manhole. It dropped down on the inside of the boiler house wall and came out into the manhole. At that point a number of valves and fittings were placed in this line (indicating). There were two lines coming out of the manhole, and one line running in. So we had a 5 inch line coming in, a 5 inch connection, a 5 inch 22 degree ell, and a continuation of the 5-inch pipe in which there was a 5 inch valve and coming out of this 5 inch tee there was a 5 inch connection with 5 inch valve, which met this line going down to Point 5 and barracks building 115. This line (indicating) went through Point 12 to the various barracks buildings, all 5 inch.

In addition to that 5 inch line, there was another 2½ inch line of very similar construction here (indicating).

Q. Were there any valves that you turned, or any wheels there? A. Yes, sir. There were two in the 5 inch steam main line and two in the 2½ inch return line.

Q. Were they the only ones that were accessible? A. Everything was accessible.

Q. Was everything else covered with magnesia? A. Everything else was covered with magnesia.

Q. Except the walls? A. Excepting the walls and the valve stems.

Q. What is a valve stem? A. The stem of the valve which comes out of the body of the valve, and when you turn the wheel of that valve, the stem causes the valve to sink.

In addition to the material which I have already said was in this pit, there was a connection, a driptrap, and the purpose of the driptrap, as is claimed by Mr. Dubois, was to remove the water from here (indicating) and deliver it to the return line so the steam going forward from this point (indicating) would be free of that water.

Q. What was the purpose of having a manhole? Was it to give you access to these various things, so that you could turn the steam on and off? A. No, sir. The purpose of these manholes was two-fold: First, to provide at certain points valves to turn off the steam to certain buildings without being obliged to turn off the steam to all buildings, and, in the second place, to provide points at which the steam, the water, the condensation could be removed from the steam lines and delivered over into the return lines.

Mr. Dubois stated that another reason for the existence of the valves in the lines was so that repairs could be made in one building without turning off the steam at all points.

Q. Similar to our turning off the water in a bath room and having it run in the kitchen? A. That is right.

Q. I think you have told us what waterproofing you did inside these manholes. Let me see if I correctly understood you. I understood you to say that this other subcontractor of yours installed only the magnesia, taking over at the place where the manhole was entered, and of course his magnesia, I presume, would be of the same diameter as employed in the underground line. I suppose you fastened that magnesia by some kind of a band? A. Yes, sir.

Q. And that undertook to cover all the pipe that went through? A. Yes, sir.

Q. Now, as to the asphalt, I understood you put
 182 some kind of waterproof paper around the projected
 edge of the casing and fastened that with some kind
 of band, and then brought that paper—you had it taped
 down to a point where you fastened that around the mag-
 nesia? A. Yes, sir; they wrapped it around the magnesia.

Q. That is all you did? A. Yes, sir.

Q. I presume your description of this No. 11 would more
 or less apply to 5 and the others? A. With minor excep-
 tions of the various fittings which might be different in the
 different manholes, the description which I have just given
 of No. 11 would apply to all the manholes.

Q. At No. 14 you had the expansion loop. Was that in
 the manhole? A. No, sir. The manhole at that point was
 adjacent to the expansion loop. As a matter of fact, in the
 original plans no manhole was shown at that point, but it
 was found at the time that we ran this line past the posi-
 tion of Dodd Boulevard that, in order to avoid certain ob-
 structions, namely existing underground pipe, electric con-
 duct and other things which were existing in the ground
 but which had not been shown upon the original plans, that
 we were not able to follow the grades originally prepared
 for us by the War Department. We therefore were
 183 compelled to make a change in the field to meet these
 unforeseen conditions and place a drip pit adjacent
 to expansion loop No. 14, which we had not originally in-
 tended to place there.

Q. A drip pit is a manhole? A. Yes, sir.

The Court: Now, Mr. Platt, do you think your witness
 has adequately explained what was in the manhole, and how
 the pipe in there was waterproofed?

Mr. Pratt: If we have anything more to say—he knows
 more about it. Do you think you have explained it com-
 pletely?

The Witness: I do not know whether I have explained it
 to his Honor properly. It is clear in my mind.

The Court: If when Mr. Dubois has finished he wants to say anything more to me, he may.

May I ask Mr. Dubois to tell me what he would consider proper engineering practice?

Mr. Fitzgerald: I want to ask Mr. Gothwaite one question:

Q. Was that manhole built before the mechanics put the Durant in there? A. Yes, sir, it was built approximately the same time. In other words, the connections were made in this manhole to which I have just referred in that same manner in which they were made in all the other manholes.

Q. They were all built before the Durant was put
184 in the manholes? A. No, sir. They were framed out as we ran the pipe along the ground. We varied the locations of these manholes in such a way that the manhole would come at the end of a full length of pipe. In order to avoid cutting the pipe unnecessarily, the manholes were actually placed a few inches or feet out of position as shown on the exact plans, but that was by agreement with the inspectors of the War Department, so that we stopped the pipe where it came to the manhole and started it up again at the other end or approximately the other end of the manhole. At that point we framed out with wooden frames, frames for the pouring of the concrete walls, and went ahead from that point. Our concrete men came behind and did the pouring in their good time.

Q. Was there ever any Durant material placed down into the ground at a point where a manhole was supposed to be put when as a matter of fact there was no manhole there at all? Was Durant material put down and then a manhole constructed afterwards? A. No, sir. The holes for the manholes were excavated before we laid the Durant, but the walls were not poured until after we laid the Durant, because we form walls for the manholes around the Durant.

By the Court:

Q. Then there would be times when the pipe would
185 be lying there waiting for the manhole to be com-

pleted? A. Surely; that was our customary procedure.

* * * * *

195 **From Direct Examination of John P. Dubois.**

Q. Now, coming to the interior of this manhole, what do you understand, according to your contract with the plaintiff, as to what your duties were, where they ended and what the plaintiff's obligations were in connection with——

A. (interposing) Our contract, to my mind, is clear on that point. We said that we would furnish the necessary material so that it would reach to the inner phase of any manhole or building walls, that we would waterproof where the conduit entered the foundation or manhole walls; and we stopped there.

It is optional with the contractor whether he gives the work inside the manholes to us, to some other contractor, or does it himself. If he gives it to us, then we would be just as responsible for the waterproofing inside as outside. In this book, we even show a page—show how an expansion joint should be insulated inside of a manhole if the sleeve type of joint or the badger joint was used.

Q. Can you describe that? A. Well, it is the same Durant treatment, made up of over-size material, so that the joint has free access in there to move without coming in contact at all with the insulated portion of the material.

Q. Do you recall whether or not this——

By the Court:

Q. Let me get this explanation. You have a 3-inch
196 pipe? A. That is right.

Q. And a 3-inch air space? A. Yes, at that point there is a 3-inch air space. That is caused by the 3-inch joint that starts here (indicating), where the head comes into 3-inch pipe, being larger than the pipe. All those types of expansion joints are larger.

Q. At the point of entrance, what do you have here? A. Insulation.

Q. Magnesia? A. That is right.

Q. Only. A. That is right. This (indicating) is magnesia.

Q. Any asphalt in there? A. This white line is all asphalt. The reason that this magnesia is here (indicating) and here (indicating) is that the heat that accumulates in this chamber cannot strike the asphalt.

Q. State that again. A. The magnesia on the inside here is placed there so that the heat that accumulates in this chamber cannot heat the asphalt.

Q. What protects the magnesia in this 3-inch air space? A. That is not an air space, but all solid magnesia.

Q. What protects it at the end, where it joins the
197 air space? A. Magnesia does not need any protection. Magnesia is always placed directly on a heater pipe. This is all magnesia here (indicating). It continues around here and here (indicating), which is all magnesia.

Q. Is the question, then, what protects the magnesia from water or from the elements, or from heat? A. Here is the magnesia, coming around the pipe here (indicating), continuing 3 inches thick at this point, while probably only an inch and a half thick at this point (indicating), continuing up here, so that there is magnesia completely around the pipe and the joint, and then there is asphalt completely around the pipe and the joint.

Q. You do that for an expansion joint in a manhole? A. That is right.

Q. Doesn't the manhole have some other purpose? Don't they have valves and things in there so that they can turn them on and off? A. In a good many cases they do. They also have trip-traps, sometimes.

Q. Can you tell me what was in these manholes, where this trouble is supposed to have arisen? A. Not from my own knowledge, no, except from the drawings that I am familiar with. There were valves and trip-traps.

Q. What is a trip-trap? A. That is a line that is
198 connected to the bottom of a steam supply line, to

take the moisture and catch the moisture from traveling to the radiator or a piece of equipment. In other words, it is to reduce as much of the moisture out of the steam as you possibly can, so the steam will be delivered to the ultimate destination, as much steam as is humanly possible.

* * * * *

Q. Mr. Dubois, when the Durant entered a manhole, went through and came out of the interior of the manhole, would it or would it not be exposed similarly to that exhibit there?

A. It would be exposed exactly like that, and if they had given us the contract——

Mr. Pratt: I object——

The witness (continuing): —to look after——

Mr. Pratt: I object to any “ifs”. He has already testified that he does not compete with mechanical contractors.

The Witness: You are asking us——

Mr. Pratt: Never mind, now. I object.

The Court: He said that they would only take contracts to do the same inside work in the manhole as outside, and that was if the main contractor should determine to employ them.

Mr. Pratt: The witness cannot guess at what might have happened.

The Witness: I am not trying to say that. I have
199 not said that. I said if we were——

Mr. Pratt: Just a minute.

The Witness (continuing): That if we had been given a contract——

Mr. Pratt: Just a minute. Please don't volunteer statements when I have an objection.

The Court: I think that if he has an opinion as to what the proper insulation was to put in the manhole, we ought to know it. I think we ought to know what is in these particular manholes, because that may have some effect. Does anybody here know?

Mr. Pratt: Mr. Gothwaite knows, and he will testify to that.

The Court: Let us take the one, the boiler house itself. Let us see the plat. I do not see why they should not do that work inside the boiler house.

Does the contract show what went in this manhole. Let me see the contract.

The Witness: It would not show. It says plans and specifications——

The Court: They have plans and specifications?

Mr. Pratt: There are other drawings that show it, but the contract does not. The specifications are here, and they show it.

The Witness: He divided his contract——

200 Mr. Fitzgerald: Just a minute.

Mr. Pratt: I am informed that the specifications do not show the details, but there are other drawings and plans which do. Mr. Gothwaite does not have those with him. Up to now we have not regarded them as being in issue in the case. But they can be produced.

Mr. Fitzgerald: The answer of the defendant specifically indicates that the responsibility was the plaintiff's because of improper insulation made by plaintiff at the manholes.

The Court: We might suspend with him for a moment, and let me ask Mr. Gothwaite about these things.

* * * * *

201 **From Examination of Plaintiff Gothwaite by the Court:**

Q. Mr. Gothwaite, take the manhole at Point 11, Boiler House. How deep is that manhole? How square and how deep? A. That manhole——

Q. About what were the dimensions, roughly? A. The dimensions were approximately, in the plan, 4 feet by 6 feet.

Q. How deep? A. Approximately 3 feet deep.

Q. How near the bottom did the steam pipes enter? A. The steam pipes entered the bottom, I should say, approximately 12 inches to 18 inches from the bottom.

Q. Was the bottom concrete, too? A. Yes, sir.

Q. Was there any drain in any of them? A. Yes, sir.

Q. What was the reason for that manhole (indicating) when the complete work was done? A. When we came out of the boiler house—the pipe came out of the boiler house, building 128, at a point about 10 feet above the ground. This (indicating) was a 5-inch steam line. A 3½ inch return line came out at the boiler house at a point 10 feet above the ground and was dropped down into the manhole. It dropped down on the inside of the boiler house wall and came out into the manhole. At that point a number 202 of valves and fittings were placed in this line (indicating). There were two lines coming out of the manhole, and one line running in. So we had a 5 inch line coming in, a 5 inch connection, a 5 inch 22 degree ell, and a continuation of a 15-inch pipe in which there was a 5-inch valve and coming out of this 65-inch tee there was a 5 inch connection with a 5 inch valve, which met this line going down to point 5 and barracks building 113. This line (indicating) went through point 12 to the various barracks buildings, all 5 inch.

In addition to that 5 inch line, there was another 2½ inch line of very similar construction here (indicating).

Q. Were there any valves that you turned, or any wheels there? A. Yes, sir. There were two in the 5 inch steam main line and two in the 2½ inch return line.

Q. Were they the only ones that were accessible? A. Everything was accessible.

Q. Was everything else covered with magnesia? A. Everything else was covered with magnesia.

Q. Except the walls? A. Excepting the walls and the valve stems.

Q. What is a valve stem? A. The stem of the valve which comes out of the body of the valve, and when you turn the

wheel of that valve, the stem causes the valve to sink.

203 In addition to the material which I have already said was in this pit, there was a connection, a trip-trap, and the purpose of the trip-trap, as is claimed by Mr. Dubois, was to remove the water from here (indicating) and deliver it to the return line so the steam going forward from this point (indicating) would be free of that water.

(After some testimony as to the purpose of a manhole:)

Q. I think you have told us what waterproofing you did inside these manholes. Let me see if I correctly understood you. I understood you to say that this other subcontractor of yours installed only the magnesia, taking over at the place where the manhole was entered, and of course his magnesia, I presume would be of the same diameter as employed in the underground line. I suppose you fastened that magnesia by some kind of a band? A. Yes, sir.

Q. And that undertook to cover all the pipe that went through? A. Yes, sir.

Q. Now, as to the asphalt, I understood you put some kind of waterproof paper around the projected edge of the casing and fastened that with some kind of band, and then brought that paper—you had it taped down to a point where you fastened that around the magnesia? A. Yes, sir; they wrapped it around the magnesia.

204 Q. That is all you did? A. Yes, sir.

Q. I presume your description of this No. 11 would more or less apply to 5 and the others? A. With minor exceptions of the various fittings which might be different in the different manholes, the description which I have just given of No. 11 would apply to all the manholes.

205 **Further examination of Mr. Dubois by the Court.**

Q. I would like to ask the other witness to state what in his opinion proper practice would require to waterproof the pipe in the manholes. A. Well, before the concrete was poured, if there were going to be any delay in that, a

rough cover or an asphalt plastic should have been put all over the end of this pipe, flashed to the pipe, so that if water got into the hole they had dug, where there eventually would be a manhole, that water could not get back into the line. Magnesia has a capillary attraction for water and will absorb about six times its weight in water. In submersion, the pipe would draw the water for 30, 40, maybe 50 feet back into the line.

When it comes to insulating traps, pipe, valves and fittings, it is impossible to properly waterproof insulation over irregular surfaces with a roofing paper. It is not common practice to do it. Roofing paper is used on straight runs of pipe providing the joints are sealed with lap cement, wired on with copper wire, then the roofing paper being hot-mopped with asphalt to close the fissures in the paper that develop when you bend it around a small cylindrical surface, and on irregular surfaces the customary practice is to block the cement and insulate the fitting and then to cut that just like a plasterer cuts a brown coat on a wall, so that you have something to guy your
 206 waterproofing material in when it is applied, and the waterproofing material on an irregular surface that goes over the insulation is always a fibroided asphalt, such as our Fibroicote or Johns Manville Insulcote.

By Mr. Fitzgerald:

Q. You heard what Mr. Gothwaite said with reference to the insulating on the inside of the manhole with the paper. Do you consider that to be a proper insulation for the protection of the Durant inside the manhole? A. No.

Q. Why not? A. Well, because a manhole is closed. It has a cap on it, with or without a manhole cover, which is iron frame with an iron lid on it and there is no air circulation in that tunnel or in that manhole. It is just the dead heat that is transmitted, either out of poor equipment or that goes out through the insulation. There is always a certain amount of heat that even orients through insulation.

Now, that continual dry heat will eventually dry out the roofing paper if it is not hot-mopped with asphalt.

The Court: What is that term?

The Witness: Hot-mopped—like taking a mop and dipping it in asphalt and taking a swab and going all over the surfaces.

That means that there are always possible openings in the water-proofing material between the points where it is tied on with copper wire. It all depends on how
 207 close he put his copper wire, whether 6, 8 or 9 inches apart. That space in between will eventually open up from the constant heat in that tunnel, and that means if any water gets into that manhole to a height sufficient to submerge the roofing paper, that the water will go right up those cracks in the insulation and be absorbed and be boiled, and the first thing there won't be any insulation in the equipment.

Q. What would be the proper insulation in the interior to prevent any possible—A. (interposing) I gave that a while ago, that on all irregular surfaces there should be a block of cement used, and over that a coating of fibroided or emulsified asphalt, so it covered every irregular surface.

On straight pipe, a roofing jacket could be used; provided that after it was put on it was all hot-mopped to the homogenous coating, the asphalt to be covered with wire ties.

Q. At what temperature would the asphalt begin to melt?

A. It would soften, probably drop, at around 235 degrees.

Q. Is it unusual, with the heat in the interior of the manhole by reason of the pipes in there and what you have described, that the heat there should rise to that temperature? A. If the pipes were uninsulated, the temperature

would rise above that point, that is, in this particular instance, because the system operated at a
 208 higher temperature than that, and there would be as much heat in that manhole as there was in that steam line.

Q. That would cause what? A. If it was not insulated, it would cause the asphalt to soften and drop out of the end of the exposed Durant, and as that dropped out it would form a pocket, so the heat would go back into the place where the asphalt had been and keep pushing back all the time; and after it got back so far, if it got back to one of the 4-inch slots on top and the asphalt had run out there—in the water it drops out of the bottom or top—the asphalt will eventually go to the bottom of the casing, and that would settle down on top and then the surface water could get into the casing, between the asphalt and the casing, and that at once would run into the manhole.

Q. If the asphalt would melt as you have described over a period of so many feet, would that cause the asphalt to come out into the earth? A. No, I have not seen a case and cannot imagine the asphalt coming out of the top of a 4-inch slot.

Q. Why? A. You have anywhere from 3 to 3 or more feet of back-fill laying on top of the conduit, and wet earth weighs quite a few pounds to the cubic foot, and if that asphalt by reason of the moisture inside has borne
209 steam which has softened the asphalt and that asphalt is fluid, the tendency is to, below that tube or casing of asphalt, run to top or bottom.

Q. Then what would come in? A. Water would come into that through the pouring slots.

210 **From the Direct examination of Thomas Hoyle.**

Q. About when did you arrive there? (Langley Field) A. It was March 4—I am not sure. It was Wednesday March 4 when I landed at Langley to start a job for the National Heating Company, and after going and looking the job over, at loop No. 6 and loop No. 10—

Q. That was 1942? A. That is correct.

Q. At that time, had any pipe material been delivered? A. There was some material delivered when I got there.

Q. About how much? A. About a truckload.

Q. That, of course, would be 20-foot lengths? A. That is right.

(After testimony about Mr. Gibson, his position and how often he was there:)

Q. What was your general position at Langley Field on this particular job, general duties? A. My general position was to seal my joints, see that it was not wet, which the stuff from No. 6 loop and No. 10 was laying in water when I got there, was not welded up.

Q. Point out No. 6 loop. Here is the boiler house.

(The witness did as requested.)

By the Court:

211 Q. What about No. 6? A. All the pipe from No. 6 loop to No. 10 loop was laying in water in the ditch, not connected up or ready for me to go ahead and put the field joints on.

By Mr. Fitzgerald:

Q. How far did it extend from No. 6 loop? A. 6 loop to 10 loop.

Q. Where is 10 loop here?

(The witness indicated).

By the Court:

Q. You say it was not welded? A. Not welded.

By Mr. Fitzgerald:

Q. About what time was that? A. Well, I got in on Langley Field around 10 o'clock in the morning, I left Washington on a Tuesday night with my machine on the boat and went into Old Point Comfort and drove on.

Q. About how many feet of pipe was laying there in the water? A. There was a feed and return line of about 350 feet.

By the Court:

Q. Those are the points you mentioned? A. That is right. On both lines.

By Mr. Fitzgerald:

212 Q. And that 350 feet includes both lines? A. That is right.

Q. What did you do with reference to finding that material that way? A. I went over and told Gibson—I says, “This here shouldn’t be laying in water.” I said, “You should protect the stuff.”

Q. Did he make any response to that? A. He said, “I can’t help that water; it doesn’t come from the ground.” I said “You should seal it up. You should call somebody down and get an idea what to do.”

Q. Did you explain to him at that time what he should do? A. I explained to him he should pull it out and seal it up.

Q. Was that done? A. No.

Q. What happened then? A. That was on a Wednesday. On a Thursday I called our engineer up, Mr. Droba, in Washington, and told him to get down there, and he got down on the following Monday or Tuesday of next week, and still it was not welded up, and laying in water.

Q. What happened after that? A. After we got
213 it welded up and stuff like that to try to help Mr.

Gibson out, Mr. Droba and myself, we suggested putting vents in it.

Q. What do you mean by that? A. It is a piece of pipe with a hole in to take all the dampness out of it when they turn the heat on.

Q. In other words, it drains it? A. That is correct.

Q. What happened to it? A. We done that there, and after they got the heat on that portion dried out irregular.

Q. Did there come a time that Mr. Gothwaite was down there looking at the job at all? A. Oh, Mr. Gothwaite used

to come down the middle of the week and most likely stay until Saturday. Some weeks he would not stay that long.

Q. When he got down there, what was the condition of the material with reference to water?

Mr. Pratt: Speaking of this first week?

Mr. Fitzgerald: At any time that Mr. Goldthwaite was there. A. That was the worst we had that water.

The Court: I have difficulty in hearing you.

A. That is the worst we had with water, in between that spot.

By Mr. Fitzgerald:

214 Q. Which you just testified to? A. That is correct; and we done our best to get that dry; then suggested to Mr. Gibson time and time again we had better seal it up and get it all set. I suggested to Mr. Gibson we would have to stilt it up; and we would run into many more of them times.

Q. Stilt it up? A. Keep it about two feet off the ground.

Q. What was done with reference to that? A. He never paid no attention.

Q. Was that material permitted to remain in the pit or ditch? A. In the ditch, yes.

Q. Was the water in it? A. Then we had a rainstorm within a day or so, and that flood got worse.

Q. Getting over to point No. 14, are you familiar with that? A. Yes, I am familiar with the whole thing.

Q. Would you mind describing as to what the condition was when you were confronted with point 14? A. Well, at 14, the pipe from No. 12 loop across the boulevard was also wet where the National Heating Company's men had busted a sewer line and had flooded the ditch from No. 12 up to the end, where we had the Durant pipe, with water.

215 Q. At that time, was any of this material exposed to the elements and not cemented over with asphalt?

A. That is correct, and it was not even welded.

Q. What did you say to the superintendent, Mr. Gibson, at that time? A. I told him I didn't like that stuff down there getting wet.

Q. Did you ask him to remedy it? A. I told him we would have to try to stop it. He paid no attention to my statement.

Q. Did there come a time that Mr. Gothwaite was there? A. Was where?

Q. At point 14, with you and with Mr. Gibson? A. At Point 14, Mr. Gothwaite was there, and Mr. Gibson was there, and the U. S. Engineers was there.

Q. That was at point 14? A. That was at point 14.

Q. Was there any water there? A. At point 14?

Q. At that time, when Mr. Gothwaite was there? A. Oh, yes; we didn't even have that loop in yet. That hole was flooded, to my knowledge, owing to the busting of a sewer. There was a cement crack.

Q. You mean asphalt? A. No, busted sewer line.

216 Q. Where was the Durant material at that time?

A. The straight line from here (indicating) to No. 14 was laying in the ditch, but No. 14 loop was not in yet, that feed or return. So after Mr. Gothwaite and Mr. Gibson and the U. S. engineers got together and decided they had to reverse the loop, and we got clear sailing for the loop; they put it in and it was fixed up in first class shape.

Q. Did there come a time that you had a conference with Mr. Gothwaite and Mr. Gibson in reference to Mr. Gothwaite's desire to hurry the job along and some of the Durant material being wet? A. Well, yes. That was on 6, 8, 10 and 12 loops. I absolutely refused to cover the fronts of those loops, because the straight line leading to those loops was, some parts of it, wet.

By the Court:

Q. What do you mean, refused to cover? You mean refused to put the waterproofing on? A. Refused to put the magnesia cover on, on account of the straight pipe leading to them was wet.

By Mr. Fitzgerald:

Q. By that, you mean this opening where you joined the two together in the field? A. That is correct.

* * * * *

217 Q. What was the condition of the manholes at the various points when you were in the process of insulating the various joints? A. Well, the only one I can say anything about was down at the boiler house.

Q. Where is that? A. No. 11, I think. They had the foundation in that; no walls up and no top, and no sign of any protection for concrete or anything around the four sides. I had told Mr. Gibson—I says, “Mr. Gibson, don’t let water get in that manhole and my covering.”

Q. What was the condition of your covering at that time. A. In first class shape.

Q. Was the covering exposed, the end of the Durant? A. The end of the Durant was exposed enough to get through the wall of the valve pit.

By the Court:

Q. That is the same as the manhole? A. That is right. That is where he has all his valves down there.

By Mr. Fitzgerald:

Q. You speak of the valve pit and of a manhole. They are all the same? A. Well, yes, they all mean the same thing.

218 Q. What was the condition of the manhole or the valve pit at No. 14 with reference to the magnesia of the Durant being exposed?

Mr. Pratt: At what time?

A. After we got done—

Mr. Pratt: I object, unless we have the time.

The Court: He has to find out what time.

By Mr. Fitzgerald:

Q. What time of the year or what time on the job was this condition at No. 11? A. In the early part of April, 1942.

Q. Explain what that condition was that you saw there with reference to the Durant?

Mr. Pratt: I am confused. Are you talking about No. 11 or No. 14?

Mr. Fitzgerald: 11; that is the boiler house.

A. You are talking about No. 11 or 14?

Q. No. 11. A. What was done?

Q. What was the condition you found there? A. Well, several days I found the pit full of water, and I notified Mr. Gibson to get it out of there and not let it get around our covering.

Q. Was your covering at that time exposed? A. Exposed for the inside of the pit.

219 Q. And there was no insulation on that covering at that time at all? A. Insulation? Only what we had on the Durant pipe, but inside the pit there was no insulation.

Q. Inside that point there was no insulation around the Durant? A. Positively, because we did not have the pit connected up yet.

Q. What did they have there? A. They was putting the valves and nipples in and stuff like that.

Q. You mean that was not built entirely around? A. That is right. There was no pit yet; just the foundation.

Q. No walls at all? A. No walls, side or nothing.

Q. And the water was allowed to accumulate in there? A. Yes.

Q. What was the condition at point 14? A. Point 14? We had laid 14 loop in on a Sunday.

Mr. Pratt: The time again, please.

A. I cannot give you it offhand, but it was in April it got laid in; sometime in April, 1942. At that loop there was supposed to be a manhole, which there was no con-

struction for it, no foundation put in for that or
 220 anything. But there was two open joints there
 which I wanted to cover time and time again, and
 Mr. Gibson said "Don't cover them, because I am going
 to put bleeders for traps."

Q. What do you mean, bleeders for traps? A. That is
 where you take and push off the steam.

Q. At that time was the Durant material wet? A. Well,
 several times in my staying on the field that was covered
 with water.

The Court: What was?

The Witness: Those two open ends.

By Mr. Fitzgerald:

Q. Two open ends of what? A. Of the Durant pipe.

Q. Were those two open ends exposed? A. Exposed in
 the water.

Q. Were they connected? A. They was connected.

Q. That is, the pipe—was the pipe already welded? A.
 The pipe was already welded.

Q. You say that you spoke to Mr. Gibson about protect-
 ing it? A. I spoke to Mr. Gibson three times about protect-
 ing it. He said absolutely not—he says "I will keep that
 hole clear. I will have to pump that out all the time."

Q. Did he have that hole clear, and did he have to
 221 pump it out all the time? A. At the time of his pump-
 ing it he would run it out, but at the time he was not
 pumping then it covered over with water.

Q. At that time was there any manhole constructed? A.
 None whatever.

Q. But there was a manhole constructed after that loop
 was changed? A. I could not tell you, because I was not
 on the field when they started to put the manholes in.

* * * * *

A. I am not familiar with any manholes outside of this
 here one at the boiler house. On the job there was no
 layout for manholes, so I went ahead.

Q. Do you mean to say you went ahead with your straight covering and there were no manholes constructed? A. That is right.

Q. Were there any ditches or pits for manholes? A. None whatever.

* * * * *
223 John P. Dubois,

* * * * *
225 By Mr. Pratt:

Q. Who is Mr. Satterthwaite? A. He is my assistant.

Q. Your assistant in the sales department? A. That is correct.

Q. You did not write this letter of November 3, 1941, proposing to furnish this equipment? A. I dictated it. My secretary wrote it. Then I left the office, and Mr. Satterthwaite signed it.

Q. Are you familiar with the contract between Mr. Gothwaite, the plaintiff here, and the government? A. I had never seen it.

Q. Yet you dictated that letter? A. That is right.

Q. And bound your company to furnish materials and to make certain installations in connection with that contract and the specifications? A. With plans and specifications, I agreed to furnish it.

Q. Do you remember dictating this part of the letter:

"We take pleasure in advising you that we will furnish our Durant insulated pipe required outside underground, for the high pressure steam heating system, in connection with the plans and specifications and Addendum No. 226 5, issued October 13, 1941"?

A. Correct; I remember dictating it.

Q. Are you familiar with the specifications?

Mr. Fitzgerald: Show them to him.

Mr. Pratt: I asked him if he is familiar with them.

A. I was familiar with the contents of them at the time I dictated that letter.

Q. And with Addendum No. 5? A. At the time I dictated that letter, I had all that information.

Q. Were you familiar with sub-paragraph No. 8 in Addendum No. 5—

Mr. Fitzgerald: Show it to the witness.

By Mr. Pratt:

Q. Were you, at the time you dictated that letter? A. Yes, I am familiar with this paragraph No. 8 in Addendum No. 5.

Q. That is a paragraph which reads:

“Specifications, page 33, paragraph 8-04, add the following:

“(f) Pre-sealed pipe shall be Ehret pre-sealed pipe, Ric-Wil pre-sealed pipe units, or equal, installed as recommended by the manufacturers. Any construction of pre-sealed pipe may contain both the steam supply and the condensate return in one casing, or they may be in separate casings. The foundation under all pipe shall be so stabilized that the grade line on which the pipe is laid will be constantly maintained.”

Were you also familiar with paragraph No. 16 of Addendum No. 5, and were you at the time you dictated that letter? A. Yes.

Q. Will you read that one, please? A. (reading) “Pre-sealed pipe shall be Ehret, Ric-Wil, or equal. No conduit is required for the installation of pre-sealed pipe. It shall be installed as recommended by the manufacturer, and shall be guaranteed by the contractor to be free of maintenance for one year after completion. If Ric-Wil insulated pipe units are used, they shall be coupled by lap welding corrugated conduit as specified by the manufacturer.”

Q. Will you answer my question as to your familiarity with that at the time you dictated that letter? A. Yes.

Q. Were you familiar, at the time you dictated that letter, with paragraph 8-13 (a) and 8-13 (b) of the specifications accompanying this contract? A. You are asking about 8-13 (a) and 8-13 (b), 1 and 2?

Q. Yes. A. Is that right?

Q. Yes, and I also refer you to Addendum No. 3, 228 which contains modifications. A. Addendum No. 3 has no connection whatever with that paragraph. The only thing that applies is page 55, paragraph 11, second line, and this paragraph is paragraph 8-13 on pages 35 and 36.

Q. I may have given you the wrong number. I am afraid it will take some little time to locate the proper addendum.

Were you familiar with those provisions in the specifications? A. That is correct.

Q. You testified that if your company had been employed to do the work inside of the manholes, it would have been differently done than it was. That is a fair statement, isn't it? A. I have no way of knowing how it was done except as Mr. Gothwaite testified. I never was on the job and saw it. I testified how is the accepted standard way of doing it.

By the Court:

Q. Assuming that he correctly described the way it was done, what is your answer? A. I would have water-proofed it in an entirely different manner than specified.

By Mr. Pratt:

Q. In an entirely different manner than specified? A. That is right.

229 Q. You would not have followed the specifications in the government contract? Is that what you mean?

Mr. Fitzgerald: Just a minute. Counsel is trying to interpret a matter in the specifications, and I submit that the witness has reference to the manner specified by the plaintiff.

Mr. Pratt: That is what I am asking, if that is what he means.

A. I would have taken the matter up with the proper authorities, through the National Heating Company, and shown them that they could not get a proper water-proofing over their insulation unless they used a plastic fabricoid,

which we would be willing to furnish in lieu of the roofing paper without change in the contract price.

Q. You were familiar with the government specifications?

A. That is correct.

Q. Is it your opinion that Mr. Gothwaite conformed to those specifications on the work inside of the manholes? A. It is not up to me to say what is meant by the specifications.

Q. You do not know whether he conformed with the specifications? A. You ask the government, rather than me, that question. It is not a question properly asked of me, as to whether he did his work right or not. You must recall—

230 Q. Just a moment, please. I think that you have finished your answer to my question.

Mr. Fitzgerald: No, he has not.

By Mr. Pratt:

Q. If you have not finished, will you do so? A. I had no interest whatever in that portion of the specifications, inasmuch as we were not under contract to do any portion of the work covered by that specification.

Q. Yet you say you were familiar with the specifications? A. Sure, because we do inside the building work as well as underground work. We are contractors to furnish all insulation.

Q. And you are familiar with the specifications? A. Correct.

Q. And you did hear Mr. Gothwaite testify as to how he treated the inside of the manholes? A. I heard him testify how he treated them, but I also heard him testify that he did not do it at all, that O'Brien did it.

Mr. Fitzgerald: O'Neill is the name.

The Witness: O'Neill; whatever his name was.

By Mr. Pratt:

Q. You heard him testify how it was done. A. I
231 heard him testify how he did it, not how it was done.

Q. You have given your opinion as to what is a good method of treating inside the manholes? A. That is correct.

Q. Will you give us your expert opinion, based on the testimony of Mr. Gothwaite, as to whether the treatment inside of those manholes was in accordance with the government specifications in this contract?

Mr. Fitzgerald: I object to that, because the witness stated that he does not know how Mr. Gothwaite or Mr. O'Neill did it, but if he is trying to find out as to the way Mr. Gothwaite testified it was done, he can qualify as an expert as to whether that was proper, not as to whether it was done in accordance with the specifications or not.

I object to the question.

(After a brief pause:)

Mr. Pratt: I do not know whether a ruling has been made on the objection.

The Court: I do not think you can ask him whether it was done in accordance with the specifications. If you want to ask him whether the way Mr. Gothwaite described it was proper, you may ask that.

Mr. Pratt: All right.

Q. Will you answer the question as modified by the
232 Court? A. As well as I remember Mr. Gothwaite's testimony, all that he referred to was that he wrapped the pipe covering with roofing paper and wired it with copper wire, and where the conduit came into the manhole he formed sort of a funnel over there and put a funnel to that point, to where it became tight around the covering.

I heard no mention in his testimony as to how he insulated valves, traps, and so forth, or how he water-proofed it.

Q. Will you read specification 8-13, on page 35, section (a)? A. You only want it as far as it refers to the underground, or the whole thing?

Q. I think you had better read it all; and the reference that I gave you to Addendum No. 3 was a wrong reference. It is Addendum 5, item 11. A. (reading) "All steam piping"—

Q. What are you reading? A. Paragraph 8-13, on page 35.

“Exposed pipe.—All steam piping shall be insulated with standard thickness, best quality, 85 percent magnesia pipe covering, held in place with number 30 B&S gauge brass-lacquered steel straps $\frac{3}{4}$ inch wide, spaced to hold ends and center of each section of the covering (and never more than 18 inches apart).”

233 Q. What are you reading from? A. This is paragraph 11 you want? This is Addendum No. 5:

“Pre-sealed pipe insulation shall be 85 percent magnesia pipe covering one and a half inch thickness on return lines of all sizes, ‘double standard’ thickness on all supply lines to and including three and a half inches, and three inches thickness on all supply lines 4 inches and larger.”

Mr. Pratt: That is just to complete the amendment to the specifications.

Q. Are you still of the opinion that Mr. Gothwaite’s treatment of the inside of the manholes was not good practice?

A. I have just testified that I did not know how he treated it.

Q. As he testified—as he described it.

Mr. Fitzgerald: I submit that that is not proper.

The Court: I think that it is proper cross examination, Mr. Fitzgerald. I asked him those questions, and he said that he did not consider it good practice, that the manner that he just described is proper. I do not know whether the specifications that you read describe how it should be done, and I do not think they do; but I think that that is the point of that matter.

By Mr. Pratt:

234 Q. Do you consider, Mr. Dubois, that the specifications which you have just read are in accordance with good practice and treatment? A. If the work was under my contract, I would have applied to the engineers for

the use of fabricoid as a water-proofing agent over all irregular surfaces that were supposed to be insulated with cement, in lieu of any paper, explaining to them that it would be impossible for them to keep a tight job if that manhole got full of water, whereas the plastic material, drying like regular plaster on a wall, would preserve it, where roofing paper would not, and I would ask them to permit me to use that other material, as the specifications permit substitutes on approval without any change in the contract price.

That is the request that I would have made of them. I did it time and again. To give you an example, in the Detroit housing job, under the buildings was a crawling space, and the buildings are about three feet off the ground. The specifications read that they should be finished with a six-ounce canvasback, a canvas jacket size, and finished with two coats of lead and oil paint.

My experience with that specification was that when you pasted the canvas on, you had to use a base, and that base in this crawling space would not dry out for weeks, depending on the canvas, and the canvas would mildew before it would be possible for you to size and paint it, and
235 the mildew would eat through the paint.

I made a recommendation on that job that they permit us to put a three-ply asbestos wire jacket on without change in the contract price, and they approved it. That is customary in all specifications, even in heating.

Q. Have you ever had experience such as that complained of here by the plaintiff in this case with reference to your Durant pipe, of the insulation deteriorating or the asphalt running out? A. In the manhole?

Q. In the manhole or elsewhere. A. We never had it run out anywhere in the manhole. We have had the experience where the customer—where it was not either specified that the equipment in the manhole was to be covered or the customer did not want to pay for the cost of insulating the equipment in the manhole, because they were in there all

the time changing gaskets or monkeying with the expansion joints or what have you. Now, that condition has existed, and on every one of those cases where they would not cover it, we have always recommended that a gland be put on the inside wall that would hold the insulation tight, and as the pipe expanded, the packing would wipe the pipe, so that no water could get in.

By the Court:

Q. What was it that you recommended? A. A
236 packing gland.

Q. Gland? A. That is right, like a gland in an engine, where the piston rod goes through. There is a packing that presses the rod, and as that rod—that packing squeezes through to that, it throws off the rod, and the only lubrication it has is what is in the packing, which is usually graphite or some similar material.

Q. Why didn't you recommend some of that in this case? A. Because the government had specified that the equipment there should be insulated. The gland is only recommended when the equipment in the manhole contains valves.

Q. Do the government specifications require sufficient insulation to cover this asphalt, or only the magnesia? A. The way that the specification reads, the magnesia should have been equal to the magnesia on the underground, and then the thickness of the roofing paper would extend up beyond the insulation and therefore part of the asphalt would have been covered, but if all the equipment, including the traps and pipes and valves up to the bonnet of the valve had been covered in accordance with the specifications, there would not have been enough heat transmitted through that insulation to have even softened the asphalt in that line or in the manhole, and neither would water have penetrated the asphalt.

237 The only thing that could have happened is, in event the insulation in the manhole failed, because of the type of waterproof jacket they had used, so that the

water got into the insulation, and that water boiled and destroyed the waterproofing of the insulation so that the heat could come out in that tunnel. I interpret those specifications that the equipment in the manhole was to be covered with a 6-ounce jacket, and waterproofing paper on top of that, and the equipment was to be covered with plastic materials of the same grade. I would not put waterproofing paper on the irregular surfaces, but I would try to get the Government to permit me to use a covering that would give the Government better service, not at an increase in cost.

I can remember Mr. Gothwaite testifying not long ago that he found that the plans showed that there was no pit outside of Point 14, but somebody decided that there should be a trap put in at that point, and that was changed; he got a change order that instructed him to put a trap at that point, and I imagine that he got a change in the contract constituting an increase for putting it in there, because it had a trap there that at least had not been figured in.

Those things come up every day on a job, where certain things are specified that are not practical, where they cannot be done on account of existing utilities in the ground or some other thing, and you go to the Government
238 and explain to them why you should not do this or that, and they will let you do so.

It was not my prerogative to go to Mr. Gothwaite or to the Government or any one else regarding work that was not in my contract.

The Court: You could have suggested it to Mr. Gothwaite, that there was a possibility of trouble there.

The Witness: Maybe my man did. He was working with their superintendent all the time, suggesting what to do and what not to do and how to do the job. Whether or not he did, I do not know. I was not on the job, but I do know that he is the type of man that makes suggestions and tells them what they should do.

The Court: Is he going to testify?

The Witness: He is going to testify, and he will probably tell you exactly—

Mr. Pratt: Let him do that testifying.

By Mr. Pratt:

Q. You are familiar with the various problems which would arise—you are thoroughly familiar with your product? A. I should say I am.

Q. You knew that unless proper precautions were taken in the installation of this pipe, that some difficulties might arise, such as deterioration of the insulation through water seepage? A. I know from the correspondence that I
239 have received and the talks I have had with the interested party that these problems did arise, and that we refused to do the work demanded of us until conditions had been corrected, and I know we were complaining all the time about them trying to do things that were not practical and that were not in accordance with good business practices, or good engineering.

Q. You knew that Mr. Gothwaite was trying to get this job completed at the earliest practicable date? A. That is right.

Q. You knew that he had a time limit in his contract? A. No, I had never seen the contract.

Q. It is in the specifications, and you do not know about it? A. Any contract may have a time limit in the specifications, but conditions are grounds for extension lots of times. That is not an unusual thing.

Q. Do you remember taking your men off of this job for two or three weeks at a time? A. No.

Q. You did not do it? A. I would not say.

Q. You do not know? A. I don't recall where they were at any particular time. I do know—

Q. None of your correspondence on this deal, or the
240 urging of Mr. Gothwaite to get this job done, had to do with the question of taking your men off the job for two or three weeks? A. Not that I recall.

The Court: I do not see any issue of that sort.

The Witness: There is no issue on it. I do know that when we got on the job, we found our material in a trench full of water.

By Mr. Pratt:

Q. Did you see it? A. No, but I have a letter that said it.

Q. Who wrote that letter? A. Our superintendent on the job, Thomas Hoyle.

Q. He is here, and he is going to testify? A. Yes. I have his letter—

Q. Never mind. Let him testify to what he saw.

Did you ever visit this job at Langley Field? A. No.

Q. Did you ever have any trouble in connection with installations that you had made in other locations with this very type of pipe, and I will ask you about Fort Belvoir. A. Lately?

Q. Yes. A. We never did any job at Fort Belvoir, to my knowledge.

241 Q. Do you know of anybody who did a job down there using Durant pipe? A. Durant pipe was not used there. I will tell you who did the job—

Q. Did you have a job at Front Royal, Virginia, where Durant pipe was used? A. There is no such place.

Q. Front Royal? A. Yes, there is.

Q. Did you have any trouble with this pipe down there? A. Yes.

Q. What kind of trouble was it? A. When the job was designed, it was laid out running from a mill building to the office building. It showed two manholes between the two points, and the job was put in with one manhole approximately in the center of the field, and they put one expansion joint on the line instead of two, and one manhole instead of two. They anchored the line at the building wall and at the office wall, and when they turned the steam on the line, the friction of the big expansion joint, the only one that they had on the job, was so great that it pulled

the anchors out of the mill building and the office building.

Then they tried it again. They put another type of anchor at the mill building and pulled it out again, and when they did that the pipes leaked, and we fixed it up and
242 we paid for that even though it was not our fault.

Q. Did you have a law suit over that case? A. No, sir.

By Mr. Fitzgerald:

Q. Did you say that it was not your fault? A. No.

By Mr. Pratt:

Q. You were very generous in that case? A. It happened that that company down there bought practically all of their insulating materials from us, and at times that account has run a quarter of a million dollars a year, so that we did not fight over picayune matters with a customer of that kind.

Q. Did you furnish the material that went on the job at the Army War College here? A. Yes, sir.

Q. Did you have any trouble over that? A. Yes, sir. We have a law suit pending over it.

Q. Will you tell us about that, where any trouble arose? A. The subcontractor took a job that was way beyond his general scope, and he put men on the job which were entirely incompetent to handle that job, and in order to get the job finished he started to throw material in trenches any old way, and it got wet, and then he decided that
243 joints should be made whether the covering was wet or not, and we refused to do it, and he said that if we did not do it that he would put his own men on the job, and we told him that if he put his own men on the job, inasmuch as they were non-union men and our men would not work there, and if he touched one joint or one foot of pipe with any men that he would put on the job that were not experienced, we would not be responsible for the job in any way.

He put men on the job, and they stayed on there for a week, and our men came off the job, and then finally he de-

cided that that was a poor thing to do, so he took his men off and ours went back again, and he gave me a list of the work that his men had finished while they were on the job, and in the final outcome, when the trouble all settled down, the points of failure were exactly those that he had enumerated in the list where his men had done the work.

Q. What was the cause of that failure? A. Water in the lines, and sealing up wet pipe covering, and putting pressure on it.

Q. There is no contention that Mr. Gothwaite undertook to do any of this work himself, is there? A. We did all of the sealing work. As far as I know, we did nothing in the manholes, because it was not a part of our contract, and the manholes were not in in some cases at all, we contend, and it is easily proven by water marks on certain man-
244 holes that the water was above the pipe.

Q. Did you see those manholes? A. No.

Q. Why do you make that contention? A. Because I have the word of several people.

The Court: Let them testify to that.

By Mr. Pratt:

Q. Now, in this Army War College job there was failure of this pipe for the reasons that you have indicated? A. That is what I said.

Q. And the failure was in the line? A. That is right.

Q. And not in the manhole? A. I do not recall that there were any manholes on that job.

Q. You say you never— A. (interposing) Oh, yes, there was; there were manholes on that job, and whether the failure came from water in the manholes primarily or whether it came at a loop that they put in, I could not tell you without refreshing my recollection exactly where the failure started.

Q. Was there any failure in the line on the Front Royal job? A. I told you there was a failure.

Q. You said that that resulted from the jerking of
245 the anchors. A. I said it pulled the anchors, and the
pipe buckled, and when you buckle the pipe you break
the rigid insulation. You can not bend that pipe without
breaking off the rigid insulation on it, and where it broke
it left water in, and after they got other anchors properly
fixed and their joint working properly, we repaired the
damage that had been caused by that break.

Q. What was the nature of the law suit in connection with
the Army War College job?

The Court: We do not want to go into that.

By Mr. Pratt:

Q. Who brought the suit?

Mr. Fitzgerald: It does not make any difference.

By Mr. Pratt:

Q. You say that you never had an installation at Fort
Belvoir? A. No.

Q. Did you have any trouble with an installation at De-
troit? A. No.

Q. No failures there? A. No. One of the biggest jobs in
the United States, and we never had a complaint on it.

Q. How big was that job? A. That job amounted
246 to \$129,500, if I remember correctly.

Q. How recent a job is that Detroit job? A. I
would say we have been finished about approximately two
years. We had been working on that job, I believe, close
to four years from the time we originally got the contract.
Then there was litigation over the general contractors;
they claimed bribery or something, and the general con-
tractor was thrown out and they got a new mechanical con-
tractor, and then we started over again, and so forth.

Q. Was there any dispute between you and the contrac-
tors as to the installation of this job? A. Not at all. They
paid for it in full, without any charge-backs or anything
else.

Q. Do you know of ever having made any recommendation, either you or your company, to Mr. Gothwaite with reference to how this pipe should be treated, with reference to the insulation or sealing which must be done on the inside of the manhole in order to protect the underground section of it? A. I do not recall. Mr. Gothwaite was up at our plant talking about various things and seeing the material, but what was said I do not recall.

Q. Yet you knew all the time that these things might happen if proper treatment were not accorded to the ends of that pipe?

247 Mr. Fitzgerald: I object to that.

The Court: I think he assumes that if it was not properly looked after and allowed to get wet, that it would be injured.

* * * * *

III. EXHIBIT.

286 Filed May 29 1944

Excerpts from Exhibit 3.

Ehret Magnesia Manufacturing Company, Incorporated
November 3, 1941.

National Heating Company
Manassas, Virginia.

Gentlemen:

Re: High Pressure Steam Distribution
Barracks Area, Langley Field, Va.
Invitation No. 616-42-126
War Department, U. S. Engineer Office
415 Postoffice & Courthouse Bldg.
Norfolk, Virginia.

We take pleasure in advising you that we will furnish our Durant Insulated Pipe required outside underground, for the High Pressure Steam Heating System, both supply

and return, in accordance with the plans and specifications and addendum #5, issued October 13, 1941, on the following basis:

Steam Heating System

Outside underground, Supply & Return

For the Sum of: \$27,500.00.

The above price is based upon furnishing standard weight steel pipe with beveled ends for welding on the Supply lines, and standard weight wrought iron pipe with beveled ends for welding on the Return lines—to be insulated as follows:

5" and 4" Steam Supply Lines, with 3" thick 85% Magnesia pipe covering.

3½" and 3" Steam Supply Lines, with Double Standard Broken Joint thickness, 85% Magnesia covering.

All Return Lines to be insulated with 1½" thick 85% Magnesia Covering.

287 Over all insulation will be applied a 1" thick coating of high melting point, non-porous Asphalt, finished with a 26-gauge galvanized jacket.

The insulated pipe will be shipped to Langley Field, Virginia, when and as directed, in accordance with the progress of the job. Freight will be paid by us on all insulated pipe furnished to Langley Field, Va., deliveries to be made via truck direct to the job site.

The above price also includes the furnishing of the Durant system for expansion loops, as per sheet No. DP-307 of the attached Brochure. We will furnish for the expansion bends: all the pipe, welding ells, over-sized insulated pipe for the legs of the bends, furnishing and installing inner casing, insulation, asphalt and outer casing over the long radius tube turns after they have been welded into position.

After the insulated pipe has been installed by the mechanical contractor and tested, we will insulate the field joints, that is, where two lengths of pipe are joined together, said joints not to exceed 18" in length;

Install the water-proofing in foundation walls where the conduit enters buildings or manholes;

Insulate all fittings and expansion bends, when and where necessary according to design.

Durant Insulated Pipe will not be run further than the inside of manhole walls in manholes.

The work and cost which will have to be absorbed by the mechanical contractor is as follows:

Excavation

Distributing of insulated pipe from point of truck delivery at job site to trenches

Installing pipe in trenches

Cost of welding ells and/or fittings which are insulated in the field, with the exception of those furnished for the expansion bends

Lining up of pipe in trenches to grade requirements

Cost of clamps, channels, and concrete for anchors

All welding and mechanical work

Back filling

Cost of installing sleeves in foundations where conduit system enters buildings.

TERMS: Net Cash.

288 We sincerely hope you will be the successful contractor on this job, and that you will decide to use our perfect, and simplified, underground system in accordance with the above.

Very truly yours,

EHRET MAGNESIA MFG. COMPANY

DWIGHT L. SATTERTHWAITE

Sales Department.

DLS:mce

P. S. Our ability to deliver the insulated pipe is dependent upon our ability to purchase the necessary bare pipe and other parts of the finished products. It will be neces-

sary for us to have priorities in order to obtain these materials.

D. L. S.

289

December 15, 1941.

Ehret Magnesia Mfg. Co.
Valley Forge, Pennsylvania

Dear Sirs:

We herewith place our order for all pipe and conduit, including expansion loops with pipe and welding fittings, for the underground Steam Distribution System for Contract W-616-eng.-1639, Langley Field, Virginia, in accordance with plans and specifications including addenda as prepared by the U. S. Engineers Office, Norfolk, Virginia. One length of 1½" w.i. return and one length 2" w.i. return is to be deducted from the total return lengths, this material being on hand.

Price: \$27,340.00, delivered at job site Langley Field, Virginia by motor truck.

Priority: A-1-A.

Shipment: Immediate. Ship to National Heating Company, Building 128, Langley Field, Virginia.

Very truly yours,

NATIONAL HEATING CO.

EDG:w

290 Ehret Magnesia Manufacturing Company
Incorporated

December 23, 1941.

National Heating Company,
Mr. E. D. Gothwaite,
338 Center St.,
Manassas, Virginia.

Dear Sir:

Re: Underground Steam Distribution System,
Contract No. W-616-eng-1639,
Langley Field, Virginia.

We acknowledge and thank you for your valued order dated December 15, for furnishing the underground insulation required in connection with this project on the basis of our proposal of November 4, 1941, which outlined in detail the materials and equipment that we are to furnish at the contract price, with the exception of:

20 ft. 2" W. I. return line
20 ft. 1½" W. I. return line

which is to be deducted from our quantities, as you are deducting the value of same from the original price quoted.

We want to call your attention to one thing; that is, the specifications on the return lines call for 1½" thick 85% Magnesia Insulation. Do you have material left over from the other job with that thickness of insulation? If not, how are you going to use up the leftover material?

It is understood that if we eventually are required to furnish these two lengths of pipe, then we are to be paid \$27,500.00, and not \$27,340.00 as called for by your letter order of December 15.

Regarding the material which we are to furnish for the expansion loops and the insulation and waterproofing of same to our Durant System, we are pleased to advise you that we guarantee that the size loops which we will furnish

will be sufficient to properly take care of the expansion of each line, and if at any time, within one year, it should
 291 be discovered that sufficient size expansion joint was not furnished, to allow for the required expansion of that particular line, we will replace same with the proper size expansion loops at our cost and expense. However, in making this guarantee, it must be understood that an anchor shall be installed at every place which may be designated by us.

We attach hereto, in triplicate, application for Priority for the pipe, casings, welding ells and inner casings which we will require in the execution of this contract.

We trust that you will find everything in order and that you will see the Priorities are issued promptly and schedules furnished showing the order in which you desire the lines delivered.

Wishing you a Merry Christmas and a Happy and prosperous New Year, we remain,

Yours very truly,

EHRET MAGNESIA MFG. COMPANY

JOHN P. DUBOIS

*Vice President in Charge of
Sales.*

JPD:SC .

• • • • •

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 8868

EHRET MAGNESIA MANUFACTURING COMPANY, INC.,
Appellant,

v.

E. D. GOTHWAITE, Trading as National Heating Company,
Appellee.

Appeal from the Judgment of the District Court of the
United States for the District of Columbia.

UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
COLLADAY, COLLADAY & WALLACE,
ELMER W. PRATT,

JOHN T. DAUGHERTY,
1331 G Street, N. W.,
Washington, D. C.,
Attorneys for Appellee.

FILED JAN 9 1945

Joseph W. Stewart

CLERK

INDEX TO BRIEF

	Page
Counter-Statement of Case	1
Summary of Argument	4
Argument	5
Conclusion	19

TABLE OF CASES AND CITATIONS.

American Concrete Steel Company v. Hart, 285 F. 322	7
Avery v. Board of Supervisors of Ionia Co., 39 N. W. 742	10
Bagley v. Cleveland Rolling Mill Co., 21 F. 159.....	16
Barrett v. Panther Rubber Mfg. Co., 24 F. (2d) 329..	18
Bird & Son v. Guarantee Construction Co., 295 F. 451.	18
Cleveland Linseed Oil Co. v. A. F. Buchanan & Sons, 120 F. 906	18
Davis Calix Drill Co. v. Mallory, 137 F. 332.....	16
Dushane v. Benedict, 120 U. S. 630 (30 L. Ed. 811, 7 S. Ct. 697)	13
Ford Motor Co. v. Cullum, 96 F. (2d) 1.....	18
General Fireproofing Company v. L. Wallace & Son, 175 F. 650	17
Granette Products Co. v. Arthur H. Neumann & Co., 200 Iowa 572, 203 N. W. 935	9
Hammaker v. Schleigh, 157 Md. 665, 147 Atl. 795.....	19
Hercules Powder Co. v. Rich, 3 F. (2d) 12.....	18
Kansas City Bolt & Nut Company v. Rodd, 220 F. 750.	18
Kellogg Bridge Company v. Hamilton, 110 U. S. 108 (28 L. Ed. 86, 3 S. Ct. 537).....	11
Lantz v. Goodwin, 210 Iowa 605, 231 N. W. 331.....	9
Linde Dredging Company v. Southwest L. E. Myers Co., et al., 67 F. (2d) 969	7
Luria Bros. & Co. v. Klaff, 139 Md. 593, 115 Atl. 849..	18-19
Maritime Trading Company v. J. M. Preston Co., 20 F. (2d) 215	18
Nashua Iron and Steel Company v. Brush, 91 F. 213..	14
Nimrod, 141 F. 215	16
St. S. Angelo Toso, 265 F. 783	17

	Page
Shaver v. Murdock, 36 Cal. 298	10
Standard Paint Co. v. Vietor, 120 Va. 595, 91 S. E. 752.	19
Tampa Shipbuilding & Engineering Co. v. General Construction Co., 43 F. (2d) 309.....	18
Union Selling Co. v. Jones, 128 F. 672.....	16
American Jurisprudence:	
12 Am. Jur. (1938) 781	6
Bouvier's Law Dictionary:	
2 Bouvier (Rawle's 3d Revision 1914) 3163....	9
Corpus Juris Secundum:	
17 C.J.S. 716-717.....	6
744-749.....	6
770-772.....	7
773	7
Williston on Contracts:	
2 Williston (Rev. Ed. 1936) 1671	6
3 Williston (Rev. Ed. 1936) 1936	7
18 Decisions of the Comptroller General (1939) 633..	11

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 8868

EHRET MAGNESIA MANUFACTURING COMPANY, INC.,
Appellant,

v.

E. D. GOTHWAITE, Trading as National Heating Company,
Appellee.

Appeal from the Judgment of the District Court of the
United States for the District of Columbia.

BRIEF FOR APPELLEE.

COUNTER-STATEMENT OF THE CASE.

The decision and judgment appealed from were obtained in the lower court by the appellee on its claim for damages resulting from breach of contract and warranty on the part of the appellant as a result of failure in proper use of operation of materials and labor of installation thereof fur-

nished by appellant in connection with construction of a high-pressure steam distribution system at Langley Field, Virginia. The judgment for the appellee was in the sum of \$5,038, the amount of his damages, less a set-off in the sum of \$3,776.95, which latter sum appellee had withheld from the appellant of the price due appellant for materials purchased and labor involved in their installation. The balance due the appellee under the judgment is \$1,261.05 (Jt. App. 22-23). As to the respective amounts involved, there is no dispute and no question on appeal.

The facts of the case as found by the lower court and set out in Paragraphs 1 to 11, inclusive, of the Findings of Fact and Conclusions of Law (Jt. App. 17-22), which are all amply supported by the evidence, are undisputed and the appeal raises no question with relation thereto. Said paragraphs are hereby incorporated herein by reference and it is prayed that the court read the same and consider them a part of this counter-statement of the case.

The only questions actually raised by the appeal and argued in appellant's brief relate to the Conclusions of Fact and Law set forth in Paragraphs 12 and 13 of the lower court's Findings of Fact (Jt. App. 22) and Paragraphs 1, 2, and 3 of the lower court's Conclusions of Law (Jt. App. 23-24), and, of course, to the ultimate finding that appellee was entitled to a judgment for the amount of his damages.

The lower court held that failure of materials and partial installation thereof furnished by appellant when put to the use for which they were intended constituted a breach on the part of appellant of its express contract, of its implied contract, and of its implied warranty of fitness; and in so holding the said court found for the appellee on four principal grounds, any one of which would have entitled appellee to a judgment, as follows: (See Jt. App. 22-24)

1. Appellant's express contract, having by reference incorporated the specifications therein, bound appellant to the guarantees contained in said specifications in so far as its materials and installation are concerned;

2. Appellant, as a subcontractor under a principal contract between the appellee and the United States, impliedly assumed all of the obligations and liabilities of the principal contract in so far as it related to the materials and workmanship undertaken and performed by the appellant;
3. Appellant, having full knowledge of the purposes for which its materials were to be used, and the appellee having relied on the skill and judgment of the appellant in the manufacture and partial installation thereof, and from the facts in this case necessarily having had to rely on the appellant's skill and judgment, there is an implied warranty that the appellant's material and installation would be free from latent defects and fit and satisfactory for the uses and purposes for which they were intended.
4. The failure of appellant's material and labor of installation resulted from a latent defect which was, or should have been, known to the appellant and it was the obligation of the appellant to correct the same or to have warned the appellee of said latent defect and advised him of the proper steps to be taken to correct the same.

The letter from appellant to appellee dated November 3, 1941, (Jt. App. 122-124), the letter from appellee to appellant dated December 15, 1941, (Jt. App. 125), and the letter from appellant to appellee dated December 23, 1941, (Jt. App. 126-127) constitute the written contract between appellant and appellee.

Appellant contends on appeal that it neither expressly nor impliedly became bound by the guarantees contained in the specifications and that it did not impliedly warrant the fitness of its materials and labor of installation against failure in proper use of operation for the purposes and uses for which they were intended, and that there was no latent defect therein; and that the lower court erred in finding for the appellee on these points.

SUMMARY OF ARGUMENT.

I. The appellant *expressly* undertook and contracted to furnish pre-sealed pipe of its own manufacture and make partial installation thereof, subject to all the terms and conditions of the principal contract between the appellee and the United States of America, and in so doing guaranteed its materials and installation against any failure in proper use of operation caused by defective materials, workmanship, or design for a period of at least one year after final acceptance of the complete work under the principal contract.

II. The appellant was a subcontractor under a principal contract between the appellee and the United States of America and, as such, *impliedly* assumed all the obligations and liabilities contained in the principal contract and the plans and specifications in connection therewith insofar as they related to the work undertaken and performed by the appellant; and as such subcontractor, the appellant *impliedly* undertook to furnish its materials and installation subject to the condition that they would be free from any failure in proper use of operation caused by defective materials, workmanship, or design for a period of at least one year from date of final acceptance by the Government of the complete work.

III. The appellant, having full knowledge of the uses and purposes for which its materials and installation were to be used, *impliedly* warranted that they were free of latent defects and fit for such uses and purposes.

IV. There is no error in the lower court's Conclusions of Fact and Conclusions of Law, and appellant having failed to show that the Findings of Fact upon which such Conclusions are based are in any sense contrary to the evidence, it follows that the lower court's decision and order should be affirmed.

ARGUMENT.

I. The appellant expressly undertook and contracted to furnish pre-sealed pipe and make partial installation thereof, subject to all the terms and conditions of the principal contract between the appellee and the United States of America, and in so doing guaranteed its materials and installation against any failure in proper use of operation caused by defective materials, workmanship, or design for a period of at least one year after final acceptance of the complete work under the principal contract.

As a part of the contract between the appellee and the appellant in this case the appellant in its letter of November 3, 1941 addressed to the appellee, stated that appellant would "furnish our Durant Insulated Pipe required outside underground, for the High Pressure Steam Heating System, both supply and return, *in accordance with the plans and specifications and Addendum #5 issued October 13, 1941.*" (Jt. App. 123).

Section 3-02 (d) of the specifications reads as follows:

"Guarantees. All articles, supplies, equipment, parts and assemblies thereof to be furnished by the contractor, of standard manufacture, or for which detailed design requirements are not prescribed in these specifications, shall be guaranteed by the contractor against any failure in proper use of operation, caused by defective material, workmanship, or design for a period of at least one year from the date of final acceptance of the complete work under this contract. Failure in any part due to such causes within that time shall be promptly and satisfactorily remedied by the contractor without cost to the United States." (Jt. App. 18)

Section 8-27 of the specifications as amended by Addendum #5 reads as follows:

"Pre-sealed pipe shall be Ehret, Ric-Wil, or equal. No conduit is required for the installation of pre-sealed pipe. It shall be installed as recommended by the

manufacturer and shall be guaranteed by the contractor to be free of maintenance for one year after completion. If Ric-Wil insulated pipe units are used, they shall be coupled by lap-welding corrugated conduit as specified by the manufacturer." (Jt. App. 19)

The undisputed evidence shows that the appellant was fully acquainted with the plans and specifications and various addendums in connection with the original contract, and must be presumed to have used the above-quoted language in its letter of November 3, 1941 in the light of such knowledge. Its express undertaking, then, must have been to furnish materials and installation which would meet those specifications and the guarantee therein contained against failure of its materials and installation within a period of at least one year.

A general rule of construction is that writings referred to in a contract, if identified, may be construed as a part of the contract to the extent to and the purpose for which such reference is made; and reference is sufficient without actual annexation. 17 C. J. S., 716-717 Sec. 299; 12 Am Jur. (1938) 781.

Another general rule of construction is that, in arriving at the intention of the parties where the language of a contract is susceptible of more than one construction, it may and should be construed in the light of the circumstances surrounding them at the time it was made, it being the right and duty of the Court to place itself as nearly as may be in the situation of the parties at the time, so as to view the circumstances as they viewed them, and so to judge the meaning of the words and the correct application of the language of the contract. For this purpose, in construing a contract, the Court will consider the nature of the agreement itself, together with all the facts and circumstances leading up to and attending its execution, the relation and condition of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract. 17 C. J. S. 744-749; Sec. 321; 2 Williston (Rev. Ed. 1936) 1671, Sec. 581.

Plans and specifications, not contained in the contract itself, but referred to therein, become a part of such contract for the purpose for which they are referred to and must be construed therewith. 17 C. J. S. 770-772, Sec. 327; 3 Williston (Rev. Ed. 1936) 1801, Sec. 628.

Subcontracts should be construed in connection with the main contract and the requirements thereof, and plans and specifications may be a part of a subcontract so as to be binding on the subcontractor and require the subcontract to be read in the light thereof, even though the specifications are not in express terms made a part thereof, if it is clear from the situation and the circumstances of the parties that it was their intention that the specifications should be a part of the subcontract. 17 C. J. S. 773.

In the case of *American Concrete Steel Company v. Hart*, 285 F. 322, it was held that where a subcontract providing for the excavation for a building required the subcontractor to furnish the labor and materials for the excavation in accordance with certain plans and specifications, the contract must be read with the plans and specifications. In this case, the Court (at page 326) said:

“The agreement between the parties is not evidenced alone by the contract order between the parties. The contract required Hart to furnish materials necessary for excavation ‘in accordance with plans and specifications prepared’ by the architects. As is ordinarily the case, a contract of this kind must be read with the plans and specifications. *U. S. v. Ellicott*, 223 U. S. 524, 32 S. Ct. 334, 56 L. Ed. 535; *Adams v. Indelli*, 146 App. Div. 790, 795, 131 N. Y. Supp. 519.”

In *Linde Dredging Company v. Southwest L. E. Myers Co. et al.*, 67 F. (2d) 969, it was contended that a subcontract had definitely fixed the basis for payment as between the parties; that it, and not the general contract, controlled.

The Circuit Court of Appeals for the Fifth Circuit held:

“The cases controlling here are those which hold that, when a subcontractor agrees to do the work as

provided for in the plans and specifications, and to be paid in accordance with them, and with the estimates of the engineers, these agreements, in the absence of the clearest kind of showing to the contrary, must be taken as evidencing the principal apparent purpose of the parties (*Cocke v. Vacuum Oil Co.* (Tex. Civ. App.) 63 F. (2d) 406) and the subcontractor must abide by them (*Watson Co. v. Bleeker* (Tex. Civ. App.) 283 S. W. 260).

"Appellant, by every test of what constitutes a subcontractor within the strictest meaning of that term, was established by the evidence in this case to have been one. *People v. Fidelity & Deposit Co. of Maryland*, 232 Mich. 238, 205 N. W. 157, 158; *People v. Valley Mantel & Tile Co.*, 200 Mich. 554, 166 N. W. 839; *People v. Morrison*, 228 Mich. 216, 199 N. W. 689; *Watson Co. v. Bleeker*, *supra*.

"Not only the provisions in the subcontracts themselves, but the testimony as to how the work was done, makes it clear that Linde substituted for Myers in the making of the embankment, and that everybody so understood it."

II. The appellant was a subcontractor under a principal contract between the appellee and the United States of America and, as such, impliedly assumed all the obligations and liabilities contained in the principal contract and the plans and specifications in connection therewith insofar as they related to the work undertaken and performed by the appellant; and as such subcontractor, the appellant impliedly undertook to furnish its materials and installation subject to the condition that they would be free from any failure in proper use of operation caused by defective materials, workmanship, or design for a period of at least one year from date of final acceptance by the Government of the complete work.

Even if the clear and unambiguous language contained in the exchange of letters which formed the contract between the appellee and the appellant be disregarded, nevertheless the appellant, by virtue of being a subcontractor, impliedly undertook to conform to the requirements of the

principal contract and the plans and specifications in connection therewith.

A "subcontractor" is defined in Bouvier's Law Dictionary as "one who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance." 2 Bouvier, (Rawle's 3rd Revision, 1914) 3163.

In *Lantz v. Goodwin*, 210 Iowa 605, 231 N. W. 331, a subcontractor brought suit against a general contractor for the remainder of the contract price. The appellant (general contractor) contended that the subcontractor did not perform his work according to the principal contract, and the general contractor was forced to do additional work, thus incurring additional expenses. The principal contract was offered in evidence in the lower court, and the subcontractor objected on the ground that he was not bound by it and that he had not seen the same, and his objection was sustained.

The Appellate Court, in reversing the lower court, said:

"The defendant as principal contractor, in effect, sublet a part of his contract to the plaintiffs as subcontractors. They recognized themselves as such.

"A principal contractor can get no benefit from his contract with a subcontractor unless the subcontractor complies with the requirements of the principal contract.

"It is the generally accepted rule of law in such a case that the subcontractor impliedly undertakes to conform to the requirements of the principal contract in the performance of the subcontract."

In the case of *Granette Products Co. v. Arthur H. Neumann & Co.*, 200 Iowa 572, 203 N. W. 935, cited in the case of *Lantz v. Goodwin*, as setting forth the principle of law, the facts are:

The plaintiffs, subcontractors, furnished the general contractor, defendant, architectural stones, which did not prove satisfactory to the architects, and the general con-

tractor had to remove them. Suit was brought by subcontractors against the general contractor for the value of the stone delivered. In the original contract between the defendant and the school district, the stone was to be supplied and the work to be done according to the architect's plans and specifications. The plaintiffs, however, contended that they were not bound by the original contract between the defendant and the school district. The Court said:

"The general rule is that where a subcontractor undertakes to do work according to plans and specifications of a principal contract, such plans and specifications become a part of his contract, even without an express provision that they are so made a part thereof."

An earlier case, *Avery v. Board of Supervisors of Ionia Co.*, 71 Mich. 538, 39 N. W. 742, held that the subcontractor is an under contractor, one who takes under the original contract and is to perform in accordance with the original contract and presumably with knowledge of the terms and conditions of the original contract. This case cited and quoted from *Shaver v. Murdock*, 36 Cal. 298, as follows:

"Upon a compliance on their part with the terms of the statute referred to, the right of the subcontractor, laborer, or material man to the lien, which through the original contractor inures primarily to the benefit of persons in that relation, must be determined and controlled by the terms of the original contract between the owners and the original contractor."

The theory of these cases was followed in a decision of the Comptroller General of the United States. The facts in this case are:

Under a contract with the Government which provided that

"liquidated damages would not apply if caused by strikes"; * * * " . . . but not including delays caused by subcontractors,"

the contractor placed an order with the Inland Steel Company, which was unable to perform because of a strike, and so the order was re-placed with the Apollo Steel Company. The contractor did not believe he should pay liquidated damages and contended that the Inland Steel Company was not a subcontractor.

The Comptroller General, in holding that the Inland Steel Company was a subcontractor, said:

“A subcontractor has been defined by the courts as one who enters into a contract, express or implied, with a contractor to perform part or all of the latter’s contract.” *18 Decisions of Comptroller General* 633.

III. The appellant, having full knowledge of the uses and purposes for which its materials and installation were to be used, impliedly warranted that they were fit for such uses and purposes.

As previously stated, the evidence shows that the appellant had full knowledge of the uses and purposes to which its materials and installation were to be put, and of the conditions under which the installation was to be made. Under such circumstances the law implies a warranty of the fitness of the materials and workmanship for the uses and purposes for which they are designed.

The leading case on this subject is *Kellogg Bridge Company v. Hamilton*, 110 U. S. 108 (28 L. Ed. 86, 3 S. Ct. 537). In this case a bridge company, having partially executed a contract for the construction of a bridge, entered into a subcontract with Hamilton to complete the construction. The subcontractor assumed that the work previously done by the bridge company was sufficient for the purposes for which it was designed, no statement or representation having been made by the bridge company as to the quality of the work it had done. The facts stated in the Court’s opinion (at pp. 109-110) are as follows:

“The bridge which Hamilton undertook to erect consisted of three independent fixed spans, each to be one hundred and seventy-five feet six inches in length, sus-

pended between and resting at each end of the span upon stone piers, which had been prepared to receive the same and one draw span of one hundred and eighty-five feet in length, resting upon a pier in the centre, also then prepared. In erecting the several spans it was necessary to build and use what the contract described as 'false work,' which consisted of piles driven in the river between the piers upon which the spans were to rest, and upon which was placed a platform.

"As indicated in the written contract, the Bridge Company had previously constructed a part of this false work between the first and second spans, the cost of which Hamilton paid, as by the contract he agreed to do. Assuming this work to be sufficient for the purposes for which it was designed, Hamilton proceeded to complete the erection of the bridge according to the plans furnished him.

"A part of the false work or scaffolding put up by the company sank under the weight of the first span, and was replaced by Hamilton. When the second fixed span was about two-thirds completed, the ice, which before that had formed in the river, broke up in consequence of a flood, carrying away the false work under that span, and causing the whole of the iron material then in place on the span, or on the span ready to be put in place, to fall in the river, which at that place was about sixteen feet deep. If the piles driven by the Bridge Company had been driven more firmly into the bed of the river, they would have withstood the force of the ice and flood. In consequence of the insufficiency of the false work done by that company, Hamilton was delayed in the completion of the bridge and subjected to increased expense."

After reviewing the facts and the authorities on the subject, the Court stated (at pp. 115-116) that:

"The authorities to which we have referred, although differing in the form of stating the qualifications and limitations of the general rule, yet indicate with reasonable certainty the substantial grounds upon which the doctrine of implied warranty has been made to rest. According to the principles of decided cases, and

upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller and not upon his own. In ordinary sales the buyer has an opportunity of inspecting the article sold; and the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. If there be, in fact, in the particular case, and inequality, it is such that the law cannot or ought not to attempt to provide against; consequently, the buyer in such cases—the seller giving no express warranty and making no representations tending to mislead—is holden to have purchased entirely on his own judgment. But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situations, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to the latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use.”

In the case of *Dushane v. Benedict*, 120 U. S. 630, (30 L. Ed. 811, 7 S. Ct. 697), the Court (at p. 636) said:

“When a dealer contracts to sell goods which he deals in, to be applied to a particular purpose, and the buyer has no opportunity to inspect them before delivery,

there is an implied warranty that they shall be reasonably fit for that purpose. *Jones v. Just*, L. R. 3 Q. B. 197, 203; S. C. 9 B. & S. 141, 150; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108. In such a case, in Pennsylvania, as at common law, the action upon the warranty may be either in contract or in tort. *Vanleer v. Earl*, 26 Penn. St. 277; *Schuchardt v. Allens*, 1 Wall. 359, 368”;

and (at p. 646):

“The defendants offered evidence tending to show that the contract was for clean rags, that the rags delivered were filthy and infected with the small-pox, and that their infected condition caused the breaking out of the disease in the defendants’ mill. This was of itself sufficient evidence to be submitted to the jury of a warranty and a breach of it. A warranty, express or implied, that rags sold are fit to be manufactured into paper, is broken, not only if they will not make good paper, but equally if they cannot be made into paper at all, without killing or sickening those employed in the manufacture.”

In *Nashua Iron and Steel Company v. Brush*, 91 F. 213, which cited the *Kellogg Bridge Company* case, it was held that an executory contract to make and deliver a forged iron beam strap of the best hammered scrap iron of certain particularly described dimensions to be used for a beam engine contained on implied warranty that said strap should be fitly made for the use contemplated by both parties. The Court (at p. 213) said:

“* * * it is an old rule that such an executory contract implies an agreement that the goods to be delivered will be fitly made for the use contemplated by both parties. *Benj. Sales* (6th Ed.) & 645. In 1887, in *Drummond vs. Van Ingen*, 12 App. Cas. 284, 290, Lord Herschell stated that this view of the law had been constantly acted on from the time of *Jones vs. Bright*, 5 Bing. 533, which was in 1829. There may be a question what was the rule of *Jones vs. Bright*, but that is of no consequence for our present purposes. This distinction between mere sales and executory contracts is fully

recognized by the local law. *Deming vs. Foster*, 42 N. H. 165, 173, 174.

"Whether or not the words 'implied warranty' are theoretically correct need not be considered here. However this may be, it is certain, as we have seen, that there arose an obligation that the beam strap should be fitly made; and, as no qualification was reserved by the manufacturer, he can make no claim to be relieved, except to the extent of that extremely narrow class of relief which applies to unconditional agreements. Therefore a failure to deliver a fitly made strap would be a failure in the performance of the contract, whether the defect was latent or patent, and independently of the question whether the defendant below used reasonable care in its work." * * * "Later there grew up another class of so-called implied warranties, the first glimmering of which was in 1825, in *Gray vs Cox*, 4 Barn. & C. 108, 115. In that case, Chief Justice Abbott said:

" 'At the trial it occurred to me that, if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fair and proper for such purpose. I am still strongly inclined to adhere to that opinion, but some of my learned brothers think differently.'

"This was clearly intended by that learned jurist as a qualification of the doctrine of *caveat emptor*, and to have application to a mere sale. This afterwards grew into a settled rule of law in England, and is now recognized by the Sales of Goods Act of 1893, in Section 14, as follows:

" 'Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose.'

"Newbolt's Sales of Goods Act, at page 41 et seq., groups various authorities showing that this legislation is a mere enactment of the rule as lately understood by the courts in England. The expressions in *Bridge Co. vs. Hamilton*, 110 U. S. 108, 3 Sup. Ct. 537, and else-

where, on which the plaintiff in error relies, relate to cases to which this modern English rule applies, having reference to sales of goods, and not to executory contracts for manufacturing and supplying. The rule with reference to the latter class has been so long established, both in the United States and England, that it would be impossible to break it down, or to essentially qualify it, by any incidental expressions to the contrary."

The case of Kellogg Bridge Company vs. Hamilton is cited, and the principles therein laid down are applied in the following cases:

Bagley v. Cleveland Rolling Mill Co., 21 F. 159:

This case holds that the remedies of a purchaser are not affected whether a cause of action arises out of a breach of contract, a breach of representation collateral to the contract, or out of an implied warranty.

Union Selling Co. v. Jones, 128 F. 672:

In this case it was held that in the contract for sale of binder twine the use of the words "quality guaranteed" should be construed to import a warranty that the twine was reasonably fit for the use for which binder twine is designed.

Davis Calix Drill Co. v. Mallory, 137 F. 332:

This case holds: "An implied warranty that an article will be fit for a particular purpose may be inferred from a contract to make or supply it to accomplish that purpose, because the accomplishment of the purpose is the essence of the undertaking." (p. 334)

The Nimrod, 141 F. 215:

In this case the Court (at p. 216) held:

"Where a manufacturer contracts to supply an article which he manufactures, to be applied to a particular purpose known to him, so that the buyer necessarily trusts to the judgment and skill of the manufacturer, there is an implied warranty that it shall be reasonably fit for the desired purpose. This implies that the material and workmanship shall be good, and the vendor is liable in such case for any latent defect not disclosed

to the purchaser arising from the manner in which the article was manufactured. 2 Benj. Sales 988-993; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111, 44 Am. Rep. 509; 15 Am. & Eng. Ency. of Law (2d Ed.) 1223, 1231; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup. Ct. 537, 28 L. Ed. 86; *Nashua Iron & Steel Co. v. Brush*, 91 Fed. 213, 33 C. C. A. 456; *Gage v. Carpenter*, 107 Fed. 886, 47 C. C. A. 39; *Pullman Car Co. v. Metropolitan Ry. Co.*, 157 U. S. 108, 15 Sup. Ct. 503, 39 L. Ed. 632."

General Fireproofing Company v. L. Wallace & Son, 175 F. 650:

In this case the Court held that an expressed warranty in a contract that structural steel required for a building should be sufficient to carry loads as specified by the architects, did not exclude an implied warranty that the contract for fireproofing work in connection with the same building should be performed in a workmanlike manner, and all materials used should be suitable to render the construction fit for the purposes intended.

The St. S. Angelo Toso, 265 F. 783:

In this case it was held that under the Sales Act, Pa. 1915, which the Court states is a reenactment of the existing law, there is an implied warranty of fitness for use where the seller knew goods were ordered for a particular purpose, and the buyer relied on the seller. The Court further stated (at p. 786):

"The Sales Act raises an implied warranty where, in addition to the fact that the buyer has made known to the seller the particular purpose for which the goods are required, it appears the buyer relies on the seller's skill of judgment. But before the passage of the Sales Act, where the seller knew the particular purpose for which goods were required, and there was no opportunity for inspection by the buyer before delivery, a presumption of reliance upon the seller's skill or judgment was held to arise."

"* * * the reliance of the buyer on the skill or judgment of the seller must appear; that is, it must be a fact proved in the case, either through direct evidence

of the fact itself or evidence of facts from which the inference or presumption may be drawn. One of the facts from which such inference may be drawn is the fact of knowledge by the seller that the goods are to be applied to a particular purpose, but that fact, without the lack of opportunity for inspection, would be insufficient; but when knowledge of the particular use is shown, and the lack of opportunity of inspection is also shown, then the presumption of reliance upon the skill or judgment arises."

This decision of the District Court was affirmed by the Circuit Court of Appeals of the 3rd Circuit in *St. S. Angelo Toso*, 271 F. 245.

Bird & Son v. Guarantee Construction Co., 295 F. 451:

In this case it was held that an expressed warranty in a contract of sale for a conveyor system, referring to its design, workmanship, and materials, did not prevent an implied warranty as to the system's functional efficiency. As authority, it cites (at p. 456) Williston on Contracts, Section 993 to the effect that "the implied warranty is not based upon a supposed agreement of the parties but is an obligation imposed by law."

Hercules Powder Co. v. Rich, 3 F. (2d) 12:

This case applies the doctrine of *Kellogg Bridge Co. vs. Hamilton* and holds: where defendant denies an express warranty of an article sold to plaintiff, the buyer may avail himself of implied warranty.

Ford Motor Co. v. Cullum, 96 F. (2d) 1:

This case recognizes the rule announced in *Kellogg Bridge Co. vs. Hamilton*, and adopts the rule that an expressed warranty and implied warranty, when consistent, may exist in the same contract of sale.

See also: *Cleveland Linseed Oil Co. v. A. F. Buchanan & Sons*, 120 F. 906, *Kansas City Bolt & Nut Company v. Rodd*, 220 F. 750, *Maritime Trading Company v. J. M. Preston Co.*, 20 F. (2d) 215, *Barrett v. Panther Rubber Mfg. Co.*, 24 F. (2d) 329, *Tampa Shipbuilding & Engineering Co. v. General Construction Co.*, 43 F. (2d) 309, *Luria Bros. & Co. v. Klaff*, 139 Md. 593, 115 Atl. 849, *Hammaker v. Schleigh*,

157 Md. 665, 147 Atl. 795, *Standard Paint Co. v. Vietor*, 120 Va. 595, 91 S. E. 752.

IV. There is no error in the lower court's Conclusions of Fact and Conclusions of Law, and appellant having failed to show that the Findings of Fact upon which such Conclusions are based are in any sense contrary to the evidence, it follows that the lower court's decision and order should be affirmed.

Appellant, although alleging in his points on appeal that the findings were contrary to the evidence, has failed to point out any instance in which the findings were either contrary to the evidence, unsupported by substantial evidence, or contrary to the weight of the evidence. Appellant cannot avoid responsibility merely by the assertion that the failure of its material and installation were not its fault but the fault of the appellee and that the court should have found this as a fact. There is no evidence that appellee failed in any respect to comply with the terms of his contract with the government and the plans and specifications in connection therewith, and the lower court would have been unable to make such a finding as that contended for by appellant. Appellant's representation contained in the last paragraph of its said letter of November 3, 1941 (Jt. App. 124) that its materials and partial installation are a "perfect and simplified underground system" is a complete answer to appellant's present contention that appellee should have completed and perfected appellant's job.

CONCLUSION.

It follows that the judgment of the lower court should be affirmed.

Respectfully submitted,

COLLADAY, COLLADAY & WALLACE,
ELMER W. PRATT,
JOHN T. DAUGHERTY,
1331 G Street, N. W.,
Washington, D. C.,
Attorneys for Appellee.